Calendar No. 1126

100TH CONGRESS *2d Session*	SENATE	REPORT 100-592

MARINE MAMMAL PROTECTION ACT AMENDMENTS OF 1988

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2810

OCTOBER 7 (legislative day, OCTOBER 6), 1988.—Ordered to be printed

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MARINE MAMMAL PROTECTION ACT AMENDMENTS OF 1988

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Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 2810]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2810) to amend the Marine Mammal Protection Act of 1972 and to authorize appropriations for that Act, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

PURPOSE OF THE BILL

The primary objective of the legislation is to provide for assessment and reduction of adverse effects of commercial fishing operations on marine mammal populations. The bill amends the Marine Mammal Protection Act (MMPA) and establishes a five-year program to allow incidental taking of marine mammals by commercial fishermen and to collect information regarding fishery-marine mammal interactions. Specific measures to reduce the number of porpoise killed or injured by tuna fishermen in the eastern tropical Pacific Ocean are included. In addition, S. 2810 extends the authorization of appropriations for five additional years; establishes procedures for determining the status of marine mammal populations; modifies permit requirements for scientific research, public display, and population enhancement activities; and requires a study on the epidemic affecting Atlantic bottlenose dolphin. Finally, the bill amends the Fishermen's Protective Act of 1967 and the Fur Seal Act of 1966.

Background and Needs

The MMPA was enacted in 1972, in response to increasing popular sentiment and growing concern for the welfare of marine mammals. The Act recognizes that marine mammals play an important role in marine ecosystems and that they are significant recreational and aesthetic resources. The MMPA also notes the adverse impact of human activities on some marine mammal populations, and the need to restore those populations that have been severely depleted. The central feature of the Act is a moratorium on the taking of all marine mammals by persons subject to the jurisdiction of the United States. This protection prohibits harassment of animals, as well as hunting or capturing them. In addition, imports of marine mammals or marine mammal products into the United States are banned.

While the Act places a moratorium on the taking or importation of marine mammals, it also establishes procedures through which that moratorium may be waived. Such a waiver is most commonly achieved through issuance of a permit which indicates the number and types of marine mammals which may be taken. Limited exceptions to the moratorium are provided for scientific and public display purposes, for taking by Alaskan natives of the north Pacific and Arctic coasts, and for takings incidental to commercial fishing and other operations or pursuant to international treaty obligations.

In most instances, the MMPA relies upon the condition of a marine mammal population to determine whether taking may be permitted. A stated goal of the MMPA is to maintain marine mammals at optimum sustainable population (OSP) levels. As defined in regulations, a species or stock is considered to be at its OSP level if it is within a range between its maximum net production level (MNP) and the carrying capacity of the environment. The MNP is often considered to be 60 percent of historic, unexploited population levels. Species listed as endangered or threatened under the Endangered Species Act, and species which are below OSP levels, are designated as depleted under the MMPA. For the most part, taking of animals from depleted species or populations is prohibited.

Primary responsibility for implementing the MMPA is shared by the Secretaries of Commerce and Interior. The Commerce Department, through the National Marine Fisheries Service within the National Oceanic and Atmospheric Administration (NOAA), has authority with respect to whales, porpoises, seals, and sea lions. The remaining marine mammal species (walruses, polar bears, sea otters, and manatees) are managed by the Department of the Interior through the U.S. Fish and Wildlife Service (FWS). Each promulgates regulations, issues permits, conducts scientific research, and enforces the provisions of the Act relating to species under its jurisdiction. In carrying out their responsibilities, the Secretaries consult with the Marine Mammal Commission, an independent advisory agency created by the MMPA. Consisting of three part-time Commissioners, the Commission reviews and develops recommendations concerning actions and policies which affect marine mammals.

The authorization of appropriations for the MMPA expires at the end of the current fiscal year. In the 1984 reauthorization legislation, the Department of Commerce was authorized to receive annual funds of $8.8 million for the five-year period. Funding for the Department of the Interior was authorized to increase incrementally from $2 million in fiscal year (FY) 1984 to $3 million in FY 1986, remaining at that level thereafter. The authorization of appropriations for the Marine Mammal Commission has remained constant, at $1 million each year, since FY 1983. The table below shows the amounts appropriated for marine mammal-related activities. Figures given for FY 1989 are the President's budget request:

[Dollar amounts in millions]

	Fiscal year—				
	1985	1986	1987	1988	1989
NOAA	$8.13	$8.63	$9.28	$8.68	$7.32
FWS	1.29	1.82	2.38	2.67	1.89
Commission	0.93	0.86	0.90	0.95	0.93

INCIDENTAL TAKE OF MARINE MAMMALS BY COMMERCIAL FISHERMEN

Although the Act permits the incidental taking of marine mammals in the course of commercial fishing operations, the immediate goal is to reduce such taking of insignificant levels approaching a zero mortality and serious injury rate. Consistent with this goal, the Act directed the Secretary of Commerce (Secretary) to establish a permit system and issue regulations which would ensure that the techniques and equipment used by fishermen minimize hazards to marine mammals. All commercial fishermen, including those purse seining for yellowfin tuna, are prohibited from incidentally taking marine mammals without a Federal authorization for the taking.

The Act provides two mechanisms through which NOAA, on behalf of the Secretary, may provide such an authorization. First, a "general permit" may be issued which provides for the take of relatively large numbers of marine mammals by U.S. and foreign fishermen. Second, a "small-take exception" may be issued to citizens of the United States to take small numbers of marine mammals if such taking has only a negligible effect on the population. Under existing provisions of the MMPA, neither general permits nor small-take exceptions may be issued to fishermen for the incidental take of marine mammals from populations that are depleted.

Added to the MMPA in 1981, the small-take exception is available to those U.S. fishermen who accidentally take small numbers of marine mammals. The Secretary is not required to find that the affected population is at it OSP level in order to make a determination of negligible impact and grant the exception. As a result, procedures for obtaining such an exception are simpler and require less time than those required for obtaining a general permit.

By contrast, before issuing a general permit, the Secretary is required to estimate the abundance of the marine mammals for

which the permit is required, and to determine whether the affected population is at its OSP level. Such determinations have been made for several species, but have not been made for many of the mammals that are likely to be taken during fishing operations. For example, no OSP determinations have been completed for harbor porpoises or harbor seals, both of which are incidentally taken in the gillnet fisheries in Alaska and California.

Excluding the tuna fishery, general permits and small-take exceptions were issued to U.S. fishermen in 1983, for a period of five years. These domestic marine mammal permits expire at the end of the current calendar year. Two organizations, in addition to the tuna industry, currently hold general permits for most fishing activities occurring in the Pacific Ocean. The North Pacific Fishing Vessel Owners Association holds four general permits for fisheries in the North Pacific and Bering Sea. The Pacific Coast Federation of Fishermen's Associations holds similar permits for fisheries operating off the coasts of California, Washington, and Oregon. In addition, small-take exceptions have been issued for two East Coast fisheries: the groundfish gillneet fleet in the Northeast; and the Gulf of Mexico and Atlantic menhaden purse seine fleet.

As the expiration date of marine mammal permits for the domestic fleet approaches, legal proceedings have brought NOAA's authority to reissue those permits into question. In July 1986, the Federation of Japan Salmon Fisheries Cooperative Association (Federation) applied for a five-year general permit to allow the annual incidental take of 5,500 Dall's porpoise, 450 northern fur seals, and 25 sea lions in the course of its Bering Sea salmon driftnet fishery. Following a year of administrative proceedings, NOAA issued a permit allowing the Federation to take 6,039 Dall's porpoise over a three-year period. Authority to incidentally take northern fur seals and sea lions was denied, however, because inadequate information was available to assess the status of those populations.

After the issuance of the general permit, lawsuits to enjoin the permit were filed by the Kokechik Fishermen's Association and several environmental groups. On June 15, 1987, the U.S. District Court for the District of Columbia ruled that issuance of the permit violated the MMPA. Although it was known that northern fur seals are occasionally taken by the Japanese driftnet fishery, NOAA did not authorize them to be taken under the permit, since they are below the desired OSP level. NOAA believed that it had discretion under the Act to authorize the taking of Dall's porpoise, which were found to be at the OSP level, even though some other species would be taken occasionally. The District Court's decision (*Kokechik Fishermen's Association* v. *Secretary of Commerce*) held that NOAA could not issue the permit to take Dall's porpoise if it were likely that northern fur seals would also be taken, because the act prohibits the issuance of a permit and any taking of a population that is below its OSP level. This decision has been affirmed on appeal.

The effect of the decision denying NOAA's discretion to issue permits for any taking if some of the animals to be taken are not at OSP extends beyond the Japanese fishery that was in dispute. NOAA has stated that this interpretation means that domestic

fisheries will also be jeopardized if they take fur seals or other marine mammals from populations that are either known to be below OSP or are not clearly at OSP levels. It has also stated that it may not be able to renew general permits to U.S. fishermen, and that it may have to enforce the prohibitions of the Act against accidental taking of small numbers of marine mammals from depleted populations or from those for which the status is so uncertain as to preclude a finding of negligible impact under the small-take exception.

Concurrently with the legal proceedings, action has been taken regarding the status of two marine mammal populations that are routinely taken by fishermen in the North Pacific Ocean. On May 18, 1988, NOAA issued a final rulemaking designating the Pribilof Island population of northern fur seals as depleted. A similar rulemaking procedure is underway to designate Steller sea lions as depleted. Potential East Coast fishery conflicts with depleted species are also present. Disease has severely reduced some populations of Atlantic bottlenose dolphins over the past two years, and the North Atlantic coastal stock appears to be well below historic population levels.

As a result of the *Kokechik* litigation and the designation of species as depleted, no new permits for foreign fishing operations have been issued in the last year. In addition, NOAA has indicated that renewal of permits or issuance of new permits to replace those of dometic fishermen which expire at the end of the year will not be possible, under existing provisions of the MMPA. In the absence of Congressional action, this situation could result in the closing of fisheries in the North Pacific and elsewhere.

Last spring, concern regarding the seriousness of this situation led to a series of discussions among representatives from the fishing industry and environmental groups. The result of these discussions was a joint proposal to amend and extend authorization of appropriations for the MMPA for three years. The proposal outlined suggestions for a program to maintain protection for marine mammals while allowing continued commerical fishing operations. The goal of the proposal was to provide for improved collection, reporting, and analysis of information to assess and reduce interactions between marine mammals and fishing gear. Principal elements of the agreement included the following:

(1) *Exemption for fishermen.*—The proposal called for a limited exemption from the permit requirements of the MMPA for domestic fisheries which have a continuing, documented interaction with specified marine mammals and which do not qualify for either a small-take exception or a general permit.

(2) *Assessment of fishery-marine mammal interactions.*—The agreement also called for improvement of information regarding incidental take of marine mammals, including an observer program for specified fisheries, monitoring and reporting requirements, and a centralized non-federal data management system.

(3) *Conservation measures.*—Procedures would be established to implement emergency protection measures for marine mammals and for critical habitat zones. In addition, the proposal called for modifying the population status review process to es-

tablish a timetable and facilitate participation by fishermen, environmentalists, and State resource managers.

SETTING ON PORPOISE IN THE YELLOWFIN TUNA FISHERY

For unknown reasons, yellowfin tuna tend to congregate beneath schools of porpoise in the eastern tropical Pacific Ocean (ETP). Tuna fishermen have long recognized this relationship and use the visable schools of mammals to lead them to the tuna. To catch the tuna, large purse-seine nets are drawn around the schools of tuna and porpoise. During this operation, porpoise can become entagled in the netting and may drown or die from shock or injuries. This practice of "setting on porpoise" was estimated to kill several hundred thousand porpoise a year in the 1960's and early 1970's.

Since enactment of the MMPA in 1972, the number of porpoise deaths in U.S. tuna fishing operations has been significantly reduced. This decrease has been achieved through: (1) a general permit as described earlier; (2) regulations requiring the use of porpoise-saving gear and fishing practices; (3) on-board Federal observers; and (4) numerical quotas setting maximum numbers of porpoises permitted to be killed each year. In 1980, NOAA issued a general permit for the years 1981 through 1984 with an annual quota of 20,500 porpoise for the U.S. tuna purse seine fishery. The purpose of the quota was to ensure that the porpoise stocks would not be harmed while providing a limit which was economically and technologically achievable by the tuna industry.

In 1981, the Congress adopted amendments which stated that the goal of the Act would be satisfied in the case of purse seine fishing for yellowfin tuna by the continued application of the best marine mammal safety techniques and equipment that are economically and technologically practicable. At that time, the Committee anticipated that the "zero goal" of the Act could serve to stimulate such new technology for reducing the incidental mortality rate of porpoise taken by tuna fishermen. To ensure that efforts to discover new technology would be undertaken, provisions were adopted which directed the Secretary to undertake a program of, and provide financial assistance for, research into alternative methods of locating and catching yellowfin tuna without the incidental taking of marine mammals.

In the 1984 reauthorization legislation, the general permit held by the American Tunaboat Association was extended statutorily at the 1980 quota level for an indefinite period, subject to a number of conditions. In considering the permit extension, the Commission recognized that the industry had done a very commendable job of reducing porpoise mortality since the 1970s. Also, in order to protect the coastal spotted and eastern spinner dolphins, quotas of 250 and 2,750, respectively, were incorporated into the law. Departing from past practices, the 1984 amendments to the MMPA required that mortalities of these species be counted as within, not in addition to, the overall annual quota.

During the hearings on reauthorization of the Act in 1984, it also became apparent that NOAA did not have the necessary data to assess the effect of fishing mortality on porpoise populations in the ETP. To obtain this information, the Act was amended to direct

the Secretary to carry out a scientific research program to monitor, for at least five years, population abundance and trends of affected porpoise stocks. The amendments also required appropriate modifications to the incidental take quotas and other conditions of the general permit, if the Secretary determined that authorized take levels were having a significant adverse effect on marine mammal populations.

While the U.S. industry has made dramatic improvements since enactment of the MMPA, unregulated tuna fleets of foreign nations now present a far more serious source of porpoise mortality. In 1987, 70 foreign vessels from eight different nations fished for tuna in the ETP and were estimated to kill over 100,000 porpoise. By contrast, the U.S. fleet had an incidental take of 13,992 porpoise in 1987, the second lowest on record. The figures for the year show that 60 percent of the tuna caught and more than 80 percent of the porpoise killed in the ETP were taken by foreign purse seiners. The foreign fleet is approximately twice the size of the U.S. fleet in the eastern Pacific and has estimated porpoise mortality rates which are about four times as high.

The original Act directed the Secretary of the Treasury to ban the importation of commercial fish or fish products that have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of marine mammals in excess of U.S. standards. The Act required the Secretary to obtain reasonable proof from foreign governments in order to make a finding that foreign commercial fishing techniques were not resulting in kills or injuries in excess of U.S. standards. Currently, the requisite findings are in effect for the Cayman Islands, Costa Rica, Ecuador, Mexico, Panama, Spain, Vanuatu, and Venezuela. Consequently, these are the only countries fishing for yellowfin tuna in the ETP which are allowed to export their catch to the United States.

In 1984, the Committee expressed concern that U.S. vessels had been subject to tuna-porpoise regulations for years while foreign vessels had not. Tougher restrictions were determined to be necessary to ensure that nations seeking to import tuna into the United States required their own fishermen to adhere to standards for porpoise protection comparable to our own. Amendments adopted in 1984 established a two-part test for each nation exporting yellowfin tuna to the United States. First, the foreign nation was required to adopt a program for protecting porpoise tuna fishing operations comparable to the U.S. program. Second, the average rate of porpoise mortality by a foreign fleet had to be comparable to that of the U.S. fleet. On March 18, 1988, NOAA issued an interim final rule providing regulations to govern the importation of tuna taken in association with marine mammals. The interim regulations implement the 1984 legislation. They would allow foreign nations until 1991 to show that the porpoise kill rates of their fishermen are comparable to that of the U.S. fleet.

The Inter-American Tropical Tuna Commission (IATTC) is the principal international organization involved in efforts to monitor and reduce porpoise mortality by the international fleet in the ETP. The IATTC was established by convention in 1949, to study the biology and population dynamics of tunas in the eastern Pacific Ocean. In recent years, the IATTC has developed a marine

mammal program which includes observer placement and training of foreign crews regarding the use of porpoise-saving gear and techniques. Last year, IATTC observers were carried on about 30 percent of foreign tuna vessels in the ETP.

OTHER EXCEPTIONS TO THE MORATORIUM

Permits may be issued for the taking or importation of marine mammals for public display and for scientific research. In the case of depleted stocks, permits may be issued for scientific research but not for display. The MMPA does not allow the taking or importation of marine mammals for the purpose of enhancing the propagation or survival of a depleted species or population. By contrast, authority to issue permits for captive breeding programs exists in the Endangered Species Act. Zoo and aquarium professionals have suggested that the MMPA authority to issue permits for scientific research be expanded to include such enhancement activities. In addition, they have requested that import restrictions be relaxed to allow importation of mammals from depleted populations for medical treatment, and of young or nursing animals for their protection or welfare.

Recognizing the importance of subsistence hunting and use of marine mammals to the continued physical health and economic well-being of natives who live in coastal villages, the Act exempts Alaskan natives dwelling on the coasts of the Arctic and North Pacific Oceans. Consequently, so long as takings are not wasteful, section 101(b) of the Act authorizes Alaska natives to take marine mammals for two purposes: for subsistence; and to obtain by-products for the purpose of creating and selling authentic articles of native handicrafts and clothing. Nonwasteful native hunting of non-depleted marine mammals in Alaska conducted pursuant to section 101(b) may not be limited, but the Secretary may regulate the taking of a species or stock that is depleted. In addition, recent regulations (50 CFR 18.23(f)) require marking and tagging of polar bears, walruses, and sea otters, as well as reporting to the FWS of the number of animals taken.

During its recent hearings, the Committee received testimony from the Alaska Federation of Natives, the Eskimo Walrus Commission, and several other native organizations that, in the 16 years the native exemption has controlled native hunting, marine mammal populations that are the subject of the directed native hunt (and are not subject to takings by commercial fishermen) have increased. Testimony also indicated that, through organizations such as the Eskimo Walrus Commission and the North Slope Borough, Alaskan natives are actively involved in self-regulation through their participation in cooperative management agreements. Finally, the organizations expressed their view that the Act should be amended to enable Alaskan natives to sell walrus meat in local commerce and to use by-products to manufacture contemporary handicrafts.

The Committee also has received testimony from the Sierra Club and other environmental organizations which are concerned that native hunting of a species or stock cannot be regulated until a species or stock is depleted. The organizations expressed their view

that the Act should be amended to authorize the FWS, the National Marine Fisheries Service, or another appropriate authority to regulate the native take of nondepleted species.

Based on this testimony, the Committee makes two observations. As to the first one, during the 1981 reauthorization legislation, the Act was amended to establish a procedure to enable the Federal government to transfer regulatory authority over the taking of marine mammals to the State of Alaska. The amendment established standards governing the exercise of that authority which include a subsistence hunting priority and a directive that the State regulate nonsubsistence hunting in a manner that to the "maximum extent practicable" provides economic opportunities for residents of rural coastal villages. To date, the State has not applied for and does not intend to apply for that regulatory authority. However, the State has indicated that, on a species-by-species basis, a cooperative effort would be initiated to develop management plans to assist in the implementation of Federal management responsibilities. The Committee supports cooperative efforts of this nature, and encourages Federal management agencies, environmental organizations, the Eskimo Walrus Commission, the North Slope Borough, and other interested organizations to work with the State to pursue such an approach.

Second, with respect to the various proposals for amendments to the Act, the Committee urges representatives of the native and environmental organizations that presented testimony and other interested parties to develop a joint recommendation as to whether, and if so how, the Act should be amended. The Committee is aware that this will not be an easy task. For that reason, the parties are urged to begin discussions to develop a joint recommendation in an expeditious manner.

FISHERMEN'S PROTECTIVE ACT OF 1967

The Pelly Amendment of the Fishermen's Protective Act provides the President with discretionary authority to embargo fish products from nations whose citizens are certified by the Secretary to be conducting fishing operations that diminish the effectiveness of an international fishery conservation program. The President has discretion to embargo all, some, or none of the fish products from a certified nation, and any such embargo must be consistent with the General Agreement on Tariffs and Trade.

Enacted in 1971, the Pelly Amendment was designed to provide for sanctions against Denmark, Norway, and the Federal Republic of Germany, all of which had refused to refrain from high seas salmon fishing in compliance with a ban on such fishing by the International Commission for the Northwest Altantic Fisheries. After being advised of the potential applicability of the Pelly Amendment, all three nations agreed to a phase-out of their fisheries.

Subsequently, the Pelly Amendment has been utilized to maintain the effectiveness of the whale conservation program of the International Whaling Commission (IWC). Japan and the U.S.S.R. were certified in 1974 for killing minke whales in violation of IWC quotas. The President did not impose an embargo because both na-

tions agreed to adhere to IWC quotas in the future. Chile, Peru, and the Republic of Korea were certified in 1978 for whaling in violation of IWC quotas. No embargo was imposed because all three nations pledged to join the IWC and abide by its quotas. The U.S.S.R. was certified again in 1985 for killing minke whales in excess of IWC quotas. No embargo was imposed, but its allocations for fishing in the U.S. 200-mile zone were ended until it announced that it would not conduct further whaling activities. Norway was certified in 1986 for killing minke whales in violation of the IWC moratorium. The President did not impose an embargo because Norway announced that it would not resume commercial whaling. Finally, Japan was certified in February 1988 for killing whales in violation of an IWC resolution calling upon it to refrain from such whaling. No embargo was imposed, but its allocations for fishing in the U.S. zone have been reduced.

Thus the history of the Pelly Amendment is one of mixed results. In the early years, the threat of an embargo on fish products seems to have persuaded offending nations to cease violations of international conservation programs and to have persuaded others to refrain from violations they would have otherwise committed. It has been suggested, however, that the significance of the Pelly Amendment has declined as the U.S. exports more fish products than it imports from some nations, and foreign nations have been excluded from the U.S. zone, thereby eliminating the associated threat that they would be denied allocations as a result of certification. Some nations appear to have concluded that the threat of an embargo is an empty one, and violations of the IWC's conservation program have become more, rather than less frequent. An amendment to the Pelly Amendment is needed to increase deterrence.

FUR SEAL ACT OF 1966

The Fur Seal Act of 1966, together with the MMPA, provides authority to the Federal Government to manage and harvest northern fur seals on the Pribilof Islands. The Federal Government has employed Aleut natives on the Pribilof Islands of St. Paul and St. George to carry out this harvest since 1910. Involvement of the Federal Government in sealing activities has raised objections over the years, however, and in 1983, the Fur Seal Act was amended to phase out Federal employment of the Aleuts for that purpose. To compensate the Aleuts for the loss of their primary source of income, the Fur Seal Act established a $20 million trust fund for the Pribilof Islanders to "promote the development of a stable, self-sufficient, enduring, and diversified economy not dependent on sealing".

Consistent with this purpose, both St. George and St. Paul have undertaken construction of harbor facilities to allow them to supply services and shelter to the growing U.S. fishing fleet in the Bering Sea. A particularly severe set of winter storms has delayed completion of the harbors by two years, and both communities need additional funds to allow them to operate essential services in the interim while work on the port facilities is completed.

LEGISLATIVE HISTORY

Over the past year, the full Committee and the National Ocean Policy Study have held two hearings on the reauthorization of the MMPA. The first hearing was held on April 13, 1988, for the purpose of evaluating Federal marine mammal programs, identifying reauthorization issues, and discussing in detail the incidental taking of porpoise by tuna fishermen in the ETP. Witnesses included representatives of NOAA, FWS, the Marine Mammal Commission, the Interamerican Tropical Tuna Commission, the Environmental Defense Fund, Earth Island Institute, Greenpeace, the United States Tuna Foundation, and the American Tunaboat Association. Tuna-porpoise issues covered in the hearing included the comparability standards required by the 1984 amendments, observer coverage, sundown sets by purse seiners, new or alternative fishing techniques, the status of porpoise populations, skipper performance standards, and the phasedown of the U.S. porpoise quota. Most witnesses were in agreement that further steps could and should be taken to reduce mortality by both foreign and domestic tuna fishermen. However, on the issue of legislating a reduction to zero of the U.S. quota of porpoise, concern was expressed that this action could lead to a net increase rather than a decrease in porpoise mortality.

A second hearing was held on May 19, 1988, at which time testimony was received from representatives of the fishing industry, the environmental community, NOAA, and the Marine Mammal Commission. The primary purpose of the second hearing was to examine the joint agreement reached between the environmental and fishing communities. Witnesses explained that concern regarding the Act's inflexibility in prohibiting any take from depleted marine mammal stocks, the District Court decision, and the pending expiration of domestic general permits and small-take exceptions led to a series of meetings between conservationists and industry representatives beginning in late 1987. The joint proposal outlined earlier was presented at the hearing, on behalf of 25 environmental and 17 commercial fishing organizations.

S. 2810 was introduced by Senator Kerry on September 20, 1988 and is cosponsored by Senators Adams, Breaux, Stevens, Hollings, Packwood, Wilson, Kasten, and Inouye. Later that day, the Committee considered S. 2810 in open Executive Session and agreed to two amendments by voice vote. The first was offered by Senator Stevens to provide an authorization of appropriations in FY 1990 for the St. George Trust. The second was offered by Senator Breaux and requires the Secretary to have observers collect information on living marine resources in addition to marine mammals, based on consultation with fishery management councils and State agencies. The Committee then ordered the bill reported favorably, as amended, without objection.

SUMMARY OF MAJOR PROVISIONS

MARINE MAMMAL PROTECTION ACT OF 1972

The legislation includes the following amendments to the MMPA:

1. *Authorization of appropriations.*—

[Dollar amounts in millions]

	Fiscal year—				
	1989	1990	1991	1992	1993
NOAA base program	$12.25	$12.74	$13.25	$13.78	$14.33
New observer program	2.70	8.00	8.00	8.00	8.00
FWS	3.00	3.12	3.24	3.37	3.50
Commission	1.10	1.14	1.19	1.23	1.28

2. *Interim exemption for commercial fishermen.*—Based on the agreement among commercial fishing and conservation organizations, the bill would establish a system through which commercial fishermen could obtain exemptions authorizing the incidental taking of marine mammals in the course of fishing activities. Under this system, vessel owners would have to meet certain registration and reporting requirements to qualify for an exemption. The requirements themselves would depend on whether the incidental take of marine mammals in the fishery was frequent, occasional, or rare. Implementation of an observer program would be required for those fisheries which frequently kill or seriously injure marine mammals. Other elements of the five-year program would provide for compiling and assessing information collected and mitigating adverse impacts of the fisheries on marine mammal populations. Finally, the Marine Mammal Commission would be required to develop guidelines to be used in determining permissible levels of incidental taking by fishermen.

3. *Status reviews and conservation plans.*—The bill would provide specific timetables and procedures for the Secretary to follow in conducting status reviews and preparing conservation plans for marine mammals.

4. *Reducing porpoise mortality in tuna fisheries.*—With respect to foreign tuna fishing operations, the bill would define and clarify requirements for comparing the porpoise protection programs of the United States and foreign nations. In addition, intermediary nations which buy tuna from other nations for export to the United States would be expected to show that they had complied with any U.S. ban. With respect to the U.S. tuna fishery, the bill would require skipper performance standards, restrict sundown sets and the use of certain explosive devices, and initiate a National Academy of Sciences assessment of alternative methods of locating tuna.

5. *Permits for public display and scientific research.*—The bill would modify the requirements for the issuance of public display permits and scientific research permits and authorize the issuance of permits for enhancing the survival or recovery of a species or stock.

FISHERMEN'S PROTECTIVE ACT OF 1967

The bill would broaden the embargo authority under the Pelly Amendment to include any product from a certified nation.

Additional appropriations of $3,200,000 in FY 1989 and $1,800,000 in FY 1990 would be authorized for the St. Paul Island Trust, and $3,700,000 in FY 1990 for the St. George Island Trust.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

U.S. Congress,
Congressional Budget Office,
Washington, DC, September 27, 1988.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 2810, the Marine Mammal Protection Act Amendments of 1988.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

James L. Blum,
Acting Director.

Congressional Budget Office Cost Estimate

1. Bill number: S. 2810.

2. Bill title: Marine Mammal Protection Act Amendments of 1988.

3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, September 20, 1988.

4. Bill purpose: S. 2810 would amend and reauthorize programs under the Marine Mammal Protection Act (MMPA). Section 2 of the bill would authorize the Secretary of Commerce to grant exemptions to commercial fisheries for the incidental taking of marine mammals; the Secretary would be authorized to charge fees covering the administrative costs of granting these exemptions. Section 2 would also authorize appropriations of $2.7 million for fiscal year 1989, and $8 million for fiscal years 1990, 1991, and 1992 for a fishing vessel observer program.

Other sections of S. 2810 would establish procedures for rulemakings related to the conservation of marine mammals and would require the preparation of several conservation plans and studies. To fund these activities and others under the MMPA, the bill would authorize appropriations to the Department of Commerce, the Department of the Interior, and the Marine Mammal Commission. S. 2810 would also authorize appropriations to the Secretary of Commerce for trust funds established for the Pribilof Islands.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1989	1990	1991	1992	1993
Authorization level	22.3	30.5	25.7	26.4	27.1
Estimated outlays	16.5	27.2	24.3	25.6	26.4

The costs of this bill fall within budget function 300.

Basis of Estimate: This estimate assumes that the full amounts authorized would be appropriated for each fiscal year. The estimated outlays are based on historical spending patterns.

Based on information provided by the National Oceanic and Atmospheric Administration (NOAA), CBO estimates that the exemption process required by Section 2 would cost about $1 million a year. Fees authorized by the bill would cover these costs, and these activities therefore would have no net effect on the federal budget.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: On September 23, 1988, CBO prepared a cost estimate for H.R. 4189, the Marine Mammal Protection Act Amendments, as ordered reported by the House Committee on Merchant and Fisheries. The estimated cost of S. 2810 is greater than that of H.R. 4189, because it includes an authorization for Pribilof Islands trust funds, which was not in the House bill.

9. Estimate prepared by: Michael Sieverts.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER AND TYPE OF PERSONS REGULATED

Regulations to implement section 2 of this bill, which provides interim exemptions for commercial fisheries, would apply to owners, operators, and crew members of U.S. fishing vessels and of foreign vessels with valid fishing permits issued under the Magnuson Fishery Conservation and Management Act. The status review and conservation plan process established under section 3 would only affect individuals who take marine mammal species or stocks covered by these reviews and plans. Regulations issued under section 4 concerning the taking of porpoise in the tuna fishery would apply to: owners, operators, and crew members of U.S. tuna purse seine vessels fishing for yellowfin tuna in the ETP; foreign vessels desiring to market yellowfin tuna from the ETP in the United States; and intermediary nations from which yellowfin tuna is exported to the United States. Regulations issued under section 5 would pertain to individuals and institutions involved in scientific research and public display of marine mammals. Finally, the amendments to the Fishermen's Protective Act contained in section 7 would affect persons involved in the importation of goods from countries certified under the Act.

ECONOMIC IMPACT

The Departments of Commerce and the Interior, and the Marine Mammal Commission, will incur some costs in fulfilling Federal responsibilities required under this legislation. The funding necessary to carry out these responsibilities should be modest and is not expected to have an inflationary impact on the Nation's economy. A portion of these funds will be incurred in the administration of exemptions and may be recovered through the charging of fees to vessel owners. A modest sum of money is also authorized for funding the Pribilof Island Trust Funds.

PRIVACY

This legislation will not have any adverse impact on the personal privacy of the individuals involved.

PAPERWORK

Some additional paperwork will be required from the commercial fishing industry in order to comply with the registration, exemption, and reporting requirements outlined in this legislation. Similar paperwork is already required for some existing fisheries programs and the legislation requires coordination and integration with such programs to reduce unnecessary duplication. Therefore, the resulting increase in paperwork should be minimized.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This section provides the short title, the "Marine Mammal Protection Act Amendments of 1988".

SECTION 2.—INTERIM EXEMPTION FOR COMMERCIAL FISHERIES

This section establishes a new section 114 of the MMPA to provide an interim exemption for commercial fisheries other than the yellowfin tuna fishery in the ETP. This new section supersedes, until October 1, 1993, the permit requirements and incidental taking prohibitions of the Act that would otherwise be applicable.

Subsection (a) of new section 114 specifies that the new section 114 will take effect immediately on the date of enactment of this legislation and will remain in effect until October 1, 1993. During that time period, this section, rather than sections 101, 103, and 104 of the MMPA, would govern the incidental taking of marine mammals by commercial fishermen other than tuna fishermen. The Committee intends that the new section 114 be the sole basis for authorizing, regulating, and penalizing incidental taking in the course of commercial fishing operations, and that no new permits or other authorizations shall be granted under section 101(a)(4) or 104 for incidental taking by fishermen during the interim period. The subsection also provides that this interim system would be available only to persons using vessels of the United States and vessels which have valid fishing permits issued under section 204(b) of the Magnuson Fishery Conservation and Management Act.

The Committee is aware of the decision in *Kokechik Fishermen's Association* v. *Secretary of Commerce,* which is pending before the Supreme Court on a petition for *certiorari.* The Committee does not intend that this section affect the result of that litigation, as it applies to the Japanese salmon driftnet fleet. It is the intention of the Committee that the provisions of the new section 114 not be made available to that fleet because the litigation is still pending and because of continuing uncertainties and concerns about the extent to which its operations outside the U.S. EEZ affect marine mammals and other living marine resources.

During the exemption period, the immediate goal of the Act will continue to be the reduction of the incidental kill or serious injury of marine mammals in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate. The Committee anticipates that progress toward this goal can be achieved through, among other things, education programs and the development of alternative fishing gear and techniques. The Committee commends and supports the commitment by representatives of commercial fishing organizations to undertake and fund a special research program on gear technology and fishing practices, and to educate and inform fishermen of their rights and responsibilities under the MMPA. The Committee also would encourage the ongoing cooperation and consensus among commercial fishermen and the environmental community to assist in effectively implementing the interim system.

Subsection (b) of new Section 114 identifies the types of fisheries that will be subject to observer and reporting requirements, establishes a vessel registration system, and provides for penalties under the MMPA for failure to comply with registration and reporting requirements. Vessel owners must comply with the registration and reporting requirements set by the Secretary in each category to engage lawfully in a particular fishery. Failure to do so will be a violation subject to the penalties of the Act. This subsection also provides the Secretary with authority to charge fees to cover the administrative costs of operating the exemption and reporting system. The Committee intends that the term "incidental taking", as used in this section, should be considered to mean the entanglement, serious injury, or death of a marine mammal in the course of normal fishing operations.

The Secretary is required to compile three lists of fisheries, based on the frequency of incidental taking of marine mammals by vessels in those fisheries. It is the Committee's intent that these lists be compiled with the maximum amount of public participation given the time periods involved. Further, the Committee recognizes that for the first year that this section is in effect, the Secretary may not have time to conduct adequate research to determine which fisheries should be included in each list. Therefore, the Committee intends that the list compiled under paragraph (1)(A)(i) of this subsection at a minimum include the following fisheries: Bering Sea and Gulf of Alaska groundfish trawl fisheries; Prince William Sound/Copper River salmon set and drift gillnet fisheries; Unimak Pass and False Pass purse seine and salmon drift gillnet fisheries; Columbia River salmon drift gillnet fisheries; and Washington/Oregon thresher shark drift gillnet fishery.

Paragraph (1)(A)(iii) of Subsection (b) covers those fisheries in which the incidental taking of marine mammals is an exceptional event for any individual fishermen. The Committee expects that fisheries such as the shrimp trawl fishery and menhaden purse seine fishery in the Atlantic Ocean and Gulf of Mexico, where hundreds of thousands or millions of individual sets or tows may result in a small total mortality of animals annually, would be included in this category. Other fisheries should be included in the appropriate categories based on available data and after opportunity for public comment.

Exemptions will be granted by the Secretary upon receipt of completed registrations from the vessel owners and, if reporting requirements and other conditions of the exemption are met, will be reissued in subsequent years. These exemptions, except where restricted by other provisions of this section, shall authorize the incidental taking of marine mammals, including those listed as depleted, in the course of commercial fishing operations. However, the taking of California sea otters is not provided for by the interim exemption. In this regard, the Committee intends that the provisions of this section do not supersede, or otherwise affect, any provisions of the Endangered Species Act or section 1 of P.L. 99-625, which established a California sea otter translocation and zonal management program designed to bring about their recovery. Furthermore, no intentional lethal taking of Steller sea lions or any cetacean, or any marine mammal from a depleted stock, is permitted. The intentional lethal taking of other marine mammals is exempted only when such taking is necessary to protect gear, catch, or human life, consistent with the provisions of current regulations, e.g. 50 CFR 216.24(d)(1) (ii) and (iii).

This subsection also makes clear that fishermen have a 240-day grace period available to them in order to allow time for the Secretary to establish the categories mentioned above and put in place the registration and reporting system. The intention of the Committee is that the owner of a vessel eligible for an exemption under this subsection, as well as the master and crew, will not be subject to the penalities for incidentally taking marine mammals (other than California sea otters) during the 240-day period following the passage of this reported bill.

In addition to the grace period, the Committee intends that before January 1, 1990, only a knowing violation of the requirements in paragraph (3)(C) of this subsection will subject a fisherman to a penalty. The Committee would not consider a knowing violation to include failure on the part of a fisherman to obtain an exemption because he was involved in a fishery the start of which occurred before the Secretary could make available appropriate exemption forms and decals or, because of the remote location of the fishery, the fisherman had no way of knowing of the requirements imposed on him or was unable to obtain the appropriate forms. Vessel owners should apply for an exemption to cover each fishery in which they intend to engage.

Paragraph (3)(E) of subsection (b) exempts vessel owners whose vessels are engaged in fisheries identified in paragraph (1)(A)(iii) of this subsection from penalties for incidental taking if such taking is reported. The Committee expects vessel owners in all categories

to make all reasonable efforts to release animals unharmed. In addition, the Committee does not anticipate that fishermen who are engaged in category (iii) fisheries would often find themselves in a situation requiring intentional lethal take to protect their gear, catch, or lives. The occurrence of such lethal takings would strongly suggest that the fishery should be reviewed and assigned to another category.

Finally, paragraph (5)(C) of subsection (b) authorizes the Secretary to charge a fee to cover the administrative costs of granting an exemption. The amount of any fee should not exceed reasonable administrative costs. Revenues recovered under this provision may not be used to offset the cost of an observer program, data management system, research, or any other authorized activity.

Subsection (c) of new section 114 imposes reporting requirements on fishermen holding exemptions issued under subsection (b) and specifies the information that a vessel owner must compile and submit to the Secretary. The Committee intends the process to be simple and time-sensitive, using, for example, existing logbook recording mechanisms. Such reports should include any information on marine mammals released unharmed from fishing gear, marine mammal sightings, and any physical contact and intentional harassment such as use of acoustic pest control devices. The Committee expects the Secretary to regularly compile, analyze, and make all feasible and appropriate use of these reports.

Subsection (d) of new section 114 requires the Secretary to establish a program to enhance and verify the quality of information in reports received from fishermen. The enhancement program should include education regarding the relevant statutes and regulations, possible penalties for non-compliance, and the purposes behind the applicable laws, as well as a clear explanation of the reporting requirements. The Secretary is expected to work with fishery organizations and the Marine Advisory Program to accomplish this goal.

Subsection (e) of new section 114 establishes and authorizes funds for an observer program to conduct onboard data-gathering activities on vessels engaged in those fisheries with a frequent incidental taking of marine mammals. Observers are to be deployed so that no less than 20 percent nor more than 35 percent of the effort in a given fishery is observed during the course of a fishing season. The Secretary is provided with flexibility in establishing levels of observer coverage within that range to ensure a statistically reliable sample of the level of incidental taking in a fishery. However, it is anticipated that the higher coverage levels will be provided in response to identified problems which require additional information. The Committee notes that representatives of the commercial fishing industry from the Pacific Northwest and Alaska and representatives of environmental organizations jointly agreed that the trawl fisheries of the Bering Sea and the Gulf of Alaska that are listed under subsection (b)(1)(A)(i) should be covered by 24 observers during each of the first two years that the observer program is in effect.

In distributing observers among fisheries and among vessels within a fishery, the Secretary is to be guided by specific standards listed in paragraph (2) of subsection (e) to ensure fair and equitable treatment.

Subsection (e)(4) ensures that observers placed on vessels pursuant to this section can be utilized to collect data relevant to the management of marine resources other than marine mammals. At the request of a Regional Fishery Management Council, state agency in the case of a fishery conducted in state waters, or the Secretary of the Interior regarding seabirds, the Secretary must require the observers to collect additional information on target and non-target species, including quantity, type, and physical condition.

Following public notice and opportunity for comment, if the Secretary finds that the requested information will not contribute to the protection of marine mammals, or the overall understanding of the marine ecosystem including fishery resources and seabirds, a request under paragraph (4) of subsection (e) may be declined. This provision ensures that the Secretary retains discretionary authority with respect to fishery management. The Committee finds that it is appropriate in this specific instance to require that the exercise of Secretarial discretion be contingent on the finding described above, because such a requirement is consistent with the goals of this legislation and the MMPA to improve understanding and protection of marine resources.

The Committee recognizes that situations may arise in which deployment of an observer is not possible or practicable. Paragraph (6) of subsection (e) provides conditions under which observer requirements may be waived for a vessel. First, the requirements may be waived in the case of a vessel which delivers fish directly to a floating processor without bringing the fish on board, if reliable information on marine mammal interactions may be obtained from an observer stationed on the processor rather than on the catcher vessel. This is particularly likely for joint ventures in which the foreign processing vessel already has an observer on board under the provisions of other law. However, an observer on board a processor must be able to assess incidental taking of marine mammals in the fishery. If an accurate assessment cannot be made, then observers must be deployed on the harvesting vessel. Nothing in this section should be construed to prevent the Secretary from placing observers on fishing vessels that deliver to a floating processor, should the Secretary desire to do so to enhance the collection of natural resource data.

An exception to the observer placement requirement also is provided if the facilities for quartering an observer are inadequate or unsafe. On many small vessels, most of the available space is used for the gear and catch, and there may be no area of the vessel available in which to quarter or place an observer. Under such circumstances, an alternative observer program may be used. Similarly, the Committee does not intend to require a vessel with limited space to take an observer if such placement would preclude safe operation of the vessel and gear, or require replacement of a crewmember. However, the Secretary may require the owner to make reasonable improvements to allow future placement of observers.

Finally, the Committee recognizes that the Secretary may not be able to employ, or contract for, sufficient personnel to fully staff the observer program, or that funds may not be appropriated to cover the full cost of an observer program. These events are beyond the control of the Secretary. In such circumstances, paragraph (3)

of subsection (e) lists priorities that should be met in allocating the limited resources of the Secretary.

Paragraph (7) of subsection (e) stipulates that vessel owners shall not be subject to a civil action for injuries on board a vessel with two exceptions: an observer may bring a civil action against an owner for the owner's willful misconduct; and the exemption from liability does not apply if the observer is formally engaged by the owner to perform duties on board the vessel of the sort that would normally be performed by a crewmember. The term "engaged" is used in the sense that a formal contract or an exchange of money or other consideration is involved. Thus, an observer who voluntarily provides minimal assistance in the operation of a vessel, such as by handling a line or cooking a meal, will not be considered to be engaged unless he is paid or employed to do so. This paragraph also applies the limitation on liability to owners of tuna vessels required to carry observers under section 104 of the Act.

Finally, the observer program requirements provided in subsection (e) are independent of the requirements for observer coverage mandated by other Federal or State laws or regulations, and are not intended to supersede, or in any way limit, such other requirements. Thus, for example, the requirement for 100 percent observer coverage on foreign fishing vessels under subsection 201(i) of the Magnuson Fishery Conservation and Management Act is not altered by the requirements of this subsection. At the same time, if the Secretary can effectively utilize observers deployed under other authorities to meet the provisions of this subsection, then the Secretary should do so. The Secretary may, with the consent of the vessel owner, place an observer on board vessels in a fishery where observer coverage is not required by this section.

Subsection (f) of new section 114 requires the Secretary to establish an alternative observer program for those fisheries where observer coverage is required but where deployment of observers on board fishing vessels in sufficient numbers to meet the 20 percent minimum requirement cannot be accomplished. An example of a fishery in which the alternative program would be appropriate is the Alaskan salmon gillnet fisheries, which, by law, have boats too small to carry observers. The alternative observer program may include direct observation of fishing operations from other vessels, airplanes, or points on shore. The alternative program may also be used for fisheries where observer coverage is not required but where the use of alternative observation methods would provide the Secretary with valuable marine mammal data.

Subsection (g) of new section 114 provides the Secretary with emergency authority to impose conditions and restrictions on exemptions issued to fishermen if a fishery is having an immediate and significant adverse impact on marine mammal populations, or if more than 1,350 Steller sea lions or 50 northern fur seals will be taken in a year by all fisheries combined. The Secretary's emergency authority should be used only when no alternative is available and the Secretary should consult to the maximum extent practicable with appropriate Regional Fishery Management Councils and State fishery managers before taking such action. Any action taken should minimize interference with existing fishery management programs and should take into account the economics of the fisher-

ies that may be affected and the availability of existing technology to resolve emergency problems. In requiring such considerations, the Committee does not intend to modify the results of the decision in *Committee for Humane Legislation* v. *Richardson,* which established that the primary purpose of the Act is to protect marine mammals, and that economic considerations are not dispositive. Emergency restrictions may include, but are not limited to, restriction on: the number of marine mammals that may be taken; the season or other period of time when marine mammals may be taken; the manner and location in which marine mammals may be taken; and the use of fishing techniques which are found to cause undue fatalities to any species of marine mammals.

In addition, a situation may arise in which a large number of Steller sea lions or northern fur seals are lethally taken by a fishery occurring early in the year, thereby potentially preventing other fisheries which occur later in the year from operating. If such a situation occurs, the Committee anticipates that the Secretary would work with the North Pacific Fishery Management Council, the State of Alaska, and affected fishermen to develop a system of allocating lethal takes among fisheries. Such a system shall not be used to accomplish other fishery management or social or economic objectives, nor shall it relieve the Secretary of the legal obligation to protect marine mammals as required by the Act.

This subsection also gives the Secretary general authority to impose conditions and restrictions on exemptions granted to vessel owners, including operational or gear restrictions of the type outlined under the Secretary's emergency authority. In addition, the Secretary is required to impose such restrictions in cases where a Regional Fishery Management Council or a State has not taken action necessary to mitigate adverse impacts of a fishery on a marine mammal species or stock. The Secretary should consult to the fullest extent practicable with Councils and States on the nature of such conditions or restrictions.

Subsection (h) of new section 114 requires the Secretary to design and implement an information management system capable of analyzing and processing information on incidental taking of marine mammals. In developing such a system, the Committee anticipates that the Secretary will make cost-effective use of available NOAA capabilities, including the environmental data management expertise and facilities of the National Environmental Satellite Data and Information Service, as well as existing regional information management systems.

Subsection (i) of new section 114 grants the Secretary authority to contract for services and recognizes that some States, Federal agencies, and private organizations already have related programs in place. The Secretary is required to make use of these programs where possible and appropriate. Use of existing programs, to the extent practicable, should encourage cooperation among State and Federal resource managers and is expected to minimize the cost of implementing the reported bill. In addition, the Committee recognizes that a program is in place to collect and compile observer data from foreign fishing vessels. If practicable, the Secretary should expand on this program in carrying out the requirements of subsection (e).

Subsection (j) of new Section 114 imposes restrictions on releasing confidential or proprietary business information to the public. If the Secretary enters into a contract or other agreement to collect or analyze data submitted by observers or obtained from reports, the contractor or other entity should be considered a Federal employee who is entitled to receive the data in raw form, and who is bound by the other restrictions on public release of data in this subsection. Further, the Committee understands that requests for data have been submitted to the Secretary under other authorities and those requests have been denied because the Secretary did not wish to provide data in the form requested, even though release of the data would not have violated confidentiality provisions. The data collected under this section should be made available to the public, in the form requested if possible, as long as the identity of any person or business is not disclosed.

Subsection (k) of new Section 114 requires the Secretary to issue appropriate regulations to carry out the purposes of this section. As is generally provided for in the Act, the Committee expects that the Secretary will consult with the Marine Mammal Commission regarding such regulations and the Secretary of the Interior where appropriate.

Subsection (l) of new Section 114 requires development of recommendations, based on scientific information, public participation, and government evaluation, for establishing a long-term system to govern the incidental taking of marine mammals in the course of commercial fishing after October 1, 1993.

By February 1, 1990, the Chairman of the Marine Mammal Commission is required to transmit to the Secretary and make available to the public recommended guidelines for such a system. The purpose of the guidelines is to provide a scientific rationale for determining the number of marine mammals which may be taken in fishing operations, based on the best biological information available. The guidelines must embody sound principles of wildlife management and may only be issued after full consultation with all interested parties, including but not limited to those individuals and groups interested in the conservation of marine mammals and those involved in all segments of the U.S. commercial fishing industry.

No later than February 1, 1991, the Secretary shall publish in the Federal Register for public comment a suggested regime that, if authorized by further action of the Congress, would govern the incidental taking of marine mammals by commercial fishermen. The Committee expects publication to be preceded by extensive consultation with all interested parties, including all segments of the U.S. commercial fishing industry and especially the Secretary of the Interior in regard to those species under the jurisdiction of that Secretary. In determining permissible levels of take, the Secretary should consider the economic and social, as well as the biological impacts, of the proposed regime.

After reviewing public comments and consulting with the Marine Mammal Commission on any scientific aspects of the suggested regime, but in any event not later than January 1, 1992, the Secretary shall submit his recommendations to Congress.

Section (m) of new Section 114 stipulates that the Secretary of Commerce is required to consult with, and give due deference to recommendations by, the Secretary of the Interior before taking action or making determinations on any activities authorized under this section which affect species or population stocks of marine mammals for which the Secretary of the Interior is responsible under the MMPA.

The term "Secretary" under subsection (o)(2) of new section 114 has been defined to mean the Secretary of Commerce for the sake of administering the interim exemption for commercial fisheries. The Committee recognizes, however, that the Secretary of the Interior has responsibility for administering the Act with respect to species such as sea otters. Although responsibility for implementing the interim exemption is vested in the Department of Commerce, the committee is cognizant that the Department of the Interior must have a role in making decisions which will affect species under its jurisdiction. Consultations are particularly important with respect to the issuance of regulations to mitigate adverse impacts, and the development of guidelines to govern incidental take after the exemption period. Should the Secretary of the Interior determine that the incidental taking of marine mammals in a fishery is having an adverse impact on species under its jurisdiction, the Secretary of the Interior is expected to initiate consultation with the Secretary of Commerce and to work with the Secretary of Commerce in determining appropriate measures to reduce such adverse impact. The Committee suggests that a Memorandum of Understanding between the Department of Commerce and the Department of the Interior may be helpful in defining procedures and timetables for implementing this section.

Subsection (n) of new Section 114 clarifies that the owners of fixed fishing gear such as fish weirs or beach seines will be considered vessel owners for the purposes of this section, and thus will be subject to the same requirements and restrictions as any other vessel owner.

Subsection (o) of new section 114 provides definitions for terms used in the section.

Finally, section 2(b) of this legislation amends section 102(a) of the MMPA to make it clear that persons in compliance with new section 114 are not in violation of the prohibition on taking in section 102.

SECTION 3.—STATUS REVIEW

This section adds a new section 115 and provides specific timetables and procedures for the Secretary to follow in conducting status reviews and preparing conservation plans for marine mammals. Subsection (a) of new section 115 directs the Secretary, in determining the status of any marine mammal stock or species, to follow a prescribed series of steps designed to ensure early and adequate public notice, comment, and participation in the status review process.

Subsection (b) of new section 115 directs the Secretary to prepare conservation plans for North Pacific fur seals and Steller sea lions by specific dates and as soon as possible for other depleted species.

The Secretary is encouraged to prepare and to begin implementing such plans before those deadlines to the extent possible. The Secretary is further encouraged to establish priorities for preparing conservation plans for depleted species other than Steller sea lions and North Pacific fur seals and to publish a schedule for the preparation of such plans. Although not specifically required, the Secretary may prepare conservation plans for other species that may benefit from such plans.

The Secretary of the Interior is also charged with preparing conservation plans for depleted species under that department's jurisdiction. Since recovery plans are already in place for the manatee and the California sea otter, the Secretary may wish to consider whether non-depleted species would benefit from the preparation of conservation plans.

Conservation plans will be modelled on recovery plans developed under the Endangered Species Act and will have the purpose of conserving and restoring species or stocks to optimum sustainable population levels. Among other things, conservation plans should include: (1) an assessment of the status of the species or stock and its essential habitat; (2) a description of the nature, magnitude, and causes of any population declines or loss of essential habitat; (3) an assessment of existing and possible threats to the species and its habitat; (4) a discussion of critical information gaps; (5) a description and discussion of research and management that could be undertaken to meet the objectives of the plan; and (6) a schedule for implementing the research and management actions identified in the plan.

SECTION 4.—TAKING OF PORPOISE IN TUNA FISHERY

Section 4 adds a number of provisions to the MMPA for the specific purpose of reducing the mortality of porpoise in the course of fishing for yellowfin tuna in the ETP.

Subsection (a) adds additional requirements to and clarifies what the Secretary must consider when making a finding as to whether a foreign nation is taking measures comparable to those of the United States in reducing the take of porpoise. The Secretary shall not find that a foreign nation is comparable unless it has met the standards set forth in this subsection in addition to the requirements already imposed by section 101(a)(2) of the MMPA and implementing regulations. The harvesting nation's regulatory program must include, by no later than the beginning of the 1990 fishing season, the same prohibitions that are made applicable to U.S. vessels. The delay in effective date until the beginning of the 1990 season is designed to provide the foreign nation with sufficient lead time to implement those new prohibitions of which it has not had previous notice. It is not intended to relieve the foreign government of the need to include in its regulatory program those prohibitions of which it has been given notice through the interim final regulations. The average kill rate of its fleet must be not more than two times the U.S. rate during the same period of time by the end of 1989 and no more than 1.25 times the U.S. rate by the end of 1990, and the percentage of eastern spinners and coastal spotted dolphin must not exceed 15 percent and 2 percent, respectively, of

the total number of marine mammals taken by its vessels in any year. The fishing operations of a foreign nation's vessels must be monitored, to the same extent as U.S. vessels, by an observer program of the IATTC or an equivalent international program unless the Secretary determines that an alternative program will provide sufficiently reliable documentary evidence. Finally, the harvesting nation must comply with all reasonable requests by the Secretary for cooperation in scientific research.

While the Committee is disappointed that the interim final regulations implementing the 1984 comparability amendments to the Act were issued only recently, it expects that these new amendments will be incorporated into the final regulations immediately. Recognizing that the foreign fleets harvest 60 percent of the yellowfin tuna in the ETP but kill 80 percent of the porpoise, the Committee intends these new requirements to reduce the foreign take of marine mammals, similar to those reductions made by the U.S. fleet.

Subsection (a) also directs the Secretary to initiate embargo proceedings against any intermediary nation wishing to export yellowfin tuna to the United States if that nation does not prohibit, within 60 days of the effective date of an embargo by the United States, the importation of yellowfin tuna into its own country from those nations embargoed by the United States. The Committee strongly supports this provision in order to prevent embargoed nations from circumventing U.S. restrictions, thereby weakening the effectivenes of U.S. law. If the United States embargoes yellowfin tuna and tuna products from any nation, the Committee expects that all yellowfin tuna products exported from that nation, including canned tuna containing any yellowfin, whether caught in the ETP or not, will be embargoed. If a third nation does not embargo the same products, they will not have access to the U.S. market for those products.

Finally, subsection (a) requires the Secretary, within six months after any embargo of yellowfin tuna, to certify such fact to the President. This certification will then allow the President to ban any type of fish and fish product from the embargoes nation, under the current provisions of the Pelly Amendment to the Fishermen's Protective Act of 1967, and to ban the importation of any product under the terms of the Pelly Amendment as it is amended by section 8 of the reported bill.

Subsection (b) directs the Secretary, through the Secretary of State, to initiate negotiations with foreign nations, for the purpose of protecting marine mammals. New subsection 108(a)(2)(A) of the MMPA is essentially the same as current section 108(a)(2), while paragraph (B) is a new provision. For those nations whose vessels harvest yellowfin tuna in the ETP, the Secretary is directed to work through the IATTC or a similar international organization, to develop agreements on cooperative research into alternative fishing methods and population studies, limitations on incidental take levels, and the use of the best marine mammal safety techniques and equipment for the purpose of reducing mortality.

Subsection (c) directs the Secretary to include a description of the results of these dicussions in the annual report to Congress on the MMPA.

Subsection (d) amends the conditions under which the extension of the general permit issued to the American Tunaboat Association is granted. Specifically, the Secretary is directed, by January 1, 1989, to promulgate regulations to ensure that the backdown procedure during sets on porpoise is completed, and that rolling of the purse seine net to sack-up has begun no later than 30 minutes after sundown, thereby preventing the high porpoise mortality associated with sundown sets. The Committee expects that in implementing this provision, the Secretary may prohibit the net skiff from being deployed at a certain time before sundown in order to ensure that backdown is completed and rolling has begun by 30 minutes after sundown. The Secretary may also require the use of certain gear, such as snap rings, to expedite fishing operations and minimize the impact on porpoise. It is the Committee's intent that the Secretary ensure through such regulations that tuna fishermen have completed those procedures necessary to release porpoise in the net before dark while allowing them to finish taking tuna out of the net thereafter.

The Secretary is authorized to waive or modify the regulations so as to allow sundown sets under two circumstances. First, individual skippers may be authorized to conduct operations that would otherwise be prohibited if they have demonstrated the consistent ability to prevent high mortality during sundown sets, based upon data that have been collected on observed trips. This waiver would be granted on a trip-by-trip basis for so long as that ability continues to be demonstrated. Second, the Secretary may grant such a waiver for the entire fleet in the event that a breakthrough in techniques or equipment renders the prohibitions no longer necessary.

Subsection (d) also authorizes the Secretary to grant a waiver of any terms or conditions of the general permit to a specific certificate holder for the purpose of conducting experimental fishing operations. The Committee intends that these provisions be used to authorize testing and development of new or alternative fishing gear and techniques that will reduce porpoise mortality.

Subsection (d) also requires the Secretary, before the beginning of the 1990 season, to develop and implement a system of performance standards for certificate holders. The purpose of this system is to allow the Secretary to identify certificate holders whose incidental rate of marine mammal mortality is consistently and substantially higher than the average rate of the fleet. By identifying these skippers or vessels, the Secretary will be able to use his or her authority more effectively to require training or improvements in vessel maintenance, or to suspend or revoke certificates.

The Committee is aware of the progress made by fishermen and the efforts of the skippers' panel established under the general permit to minimize porpoise mortalities. However, testimony was received that indicated the continuing and substantial differences in mortality rates among various skippers and vessels. The performance standards are intended to assist the Secretary and the industry to narrow these differences. The terms "consistently and substantially" are used to make clear that the Committee does not intend that a skipper who may have an excellent record but subsequently suffers one disaster set be identified as a poor performer. Rather, by using these terms or standards, the Committee expects

the Secretary to identify those skippers or vessels having a continuing incidental mortality rate that is above the fleet average. Those so identified would be subject to supplemental training and observation. A continued, unacceptable high rate of porpoise mortality would warrant suspension or revocation of the certificate of inclusion unless the certificate holder discharges the burden to show that it is not the result of a lack of diligence and proficiency.

This subsection also bans the use of any explosive devices, other than those classified as Class C Explosive Pest Control Devices, in the course of tuna fishing subject to the general permit. The permissible explosive pest control devices, defined by regulations of the Department of Transportation (49 CFR 173.100(ii)), may not contain more than 40 grains of explosive material. Moreover, the Secretary is required to prohibit or restrict the use of those devices defined above by April 1, 1990, unless the Secretary finds that their use does not result in the physical impairment or increased mortality of porpoise.

Subsection (d) also requires 100 percent observer coverage for all certificated yellowfin tuna vessels through 1991. After the 1991 fishing season, the Secretary may require a less extensive observer program, so long as it will provide sufficiently reliable information for the effective monitoring of porpoise mortality, as well as compliance with the provisions of the Act and implementing regulations.

Finally, this subsection requires the Secretary, in addition to his present responsibility to consult with the Marine Mammal Commission, to convene annual meetings with representatives from the conservation and scientific communities, as well as the tuna industry, to review the results of efforts to reduce porpoise mortality and develop plans for further efforts relating to the domestic and foreign fleets. Before April 1, 1992, the Secretary is required to submit to the Senate Committee on Commerce, Science, and Transportation and the House Merchant Marine and Fisheries Committee a comprehensive report on the results of the reseach programs, performance standards, observer programs, prohibition on night fishing, development of alternative fishing techniques, and other efforts. The Committee fully expects these efforts to result in a reduction of porpoise mortality throughout the international fleet. The report also is to include any recommendations the Secretary considers necessary and desirable to reduce further the porpoise mortality throughout that international fleet.

Subsection (e) directs the Secretary to request the National Academy of Sciences, through the issuance of a contract, to identify promising alternative tuna fishing techniques designed to reduce or eliminate the incidental mortality of porpoise and, within one year, submit a research, development, and implementation plan on alternative fishing techniques to the Congress. The Committee remains convinced that the ultimate solution to the tuna-porpoise issue depends upon the development and implementation of such techniques, and expects the Secretary and the Marine Mammal Commission to devote more vigorous efforts to the identification and development of such techniques.

SECTION 5.—SCIENTIFIC DISPLAY AND PUBLIC RESEARCH PERMITS

Subsection (a) amends section 109(h) of the MMPA to allow the importation of marine mammals into the United States for the purpose of providing medical treatment not otherwise available to them in the country of export. It also requires that marine mammals imported under such circumstances be returned to their natural habitat in those cases in which it is feasible. In determining whether it is feasible to return an animal to the wild, the Secretary shall consult with the attending veterinarian and curatorial staff of the institutions providing the medical treatment, as well as such other experts as the Secretary considers appropriate. The Secretary shall also consider the likelihood of whether the animal will successfully readapt to life in the wild and the possibility that the animal may transmit a contagious disease to animals in the wild.

Subsection (b) amends section 102(b) of the MMPA by creating an exception to the prohibition against the importation of marine mammals that were pregnant, nursing, or less than eight months old at the time of taking, if the importation is necessary for the protection or welfare of the animal. The purpose of the subsection is to permit the importation of young animals that have been orphaned or wounded, or are sick, and could not survive in the wild.

The Act currently prohibits the importation of such animals, even if the alternative is the death of the animal, and despite the fact that in some instances, an adult animal of the same species could be imported for public display. This dilemma has recently arisen in the case of orphaned polar bear cubs from Canada. Canadian officials have found it necessary to remove nuisance adult polar bears that represent a threat to public safety. In some instances, the lethal removal of a female bear results in a cub being orphaned, and Canada does not have adequate facilities for the permanent care of captured bears and cubs. This amendment would allow importation of these marine mammals if all other conditions for a public display permit are met. A permit could not be issued, for example, if the program for taking marine mammals in the country of origin were not consistent with the provisions and policies of the Act. Furthermore, all importations of marine mammals, including those pursuant to this section, are subject to the requirements of the Lacey Act and other applicable law regarding humane and healthful transport of wild mammals and birds.

Subsection (c) amends section 101(a) of the Act to include an authorization for the issuance of permits to take and import marine mammals for purposes of enhancing the survival or recovery of a species or stock.

Subsection (d), in general, amends section 104(c) by modifying the requirements for the issuance of public display and scientific research permits, and by establishing requirements for the issuance of permits for enhancing the survival or recovery of a species or stock.

New paragraph (2) of section 104(c) provides that to be eligible for a public display permit, an applicant must offer a program for education or conservation purposes as a component of its overall program. It is clear, however, that the education or conservation program need not be the sole or primary purpose or program of a

qualifying applicant. In addition, this paragraph requires that the Secretary determine, based on professionally recognized standards of the public display community, that the program is acceptable.

Effective public display of marine mammals provides an opportunity to inform the public about the great aesthetic, recreational, and economic significance of marine mammals and their role in the marine ecosystem. It is important, therefore, that public display facilities educate the public about the life history, behavior, unusual sensory capabilities, and other aspects of marine mammals through literature, films, or other techniques in conjunction with display. The Committee recognizes the diversity of public display facilities and the methods available to them for public education. The Secretary should recognize and foster this diversity. This section is not intended to deny the Secretary flexibility or to require the Secretary to regulate the specific content of or methods used in education or conservation programs.

Public display programs should be based on professionally recognized standards of the public display community, such as those of the American Association of Zoological Parks and Aquariums (AAZPA). AAZPA accredited facilities are permanent institutions which own and maintain captive wild animals that represent more than a token collection, are under the direction of a professional staff, provide their collections with appropriate care, and exhibit them in an aesthetic manner to the public on a regularly scheduled basis for the purposes of education, conservation, scientific studies, and recreation. Programs that approximate those of the AAZPA, or which the Secretary otherwise finds acceptable, will meet the requirements of this section. The Committee anticipates that programs based on the standards of other public display professional organizations will be acceptable to the Secretary as well. The Secretary's determination should be guided by the fact that it is not the intent of this legislation to prohibit the display of marine mammals in zoos, aquaria, or amusement parks that comply with applicable regulations and standards. The Committee recognizes that the recreational experience is an important component of public display and that public display has served a useful educational purpose, exposing tens of millions of people to marine mammals and thereby contributing to the awareness and commitment of the general public to protection of marine mammals and their environment.

In addition, an applicant's facilities must be open to the public on a regularly scheduled basis. This is intended to mean regular and predictable hours so that access is reasonably convenient to the public. A seasonal facility open to the public on a regularly scheduled basis during its open season will meet this requirement.

Finally, new paragraph (3) of section 104(c) of the MMPA provides that permits for scientific research may be issued only to an applicant conducting research to further a bona fide scientific purpose that does not involve unnecessary duplication. The National Marine Fisheries Service regulations already use the term "bona fide" as one of the criteria to be considered before issuing a scientific research permit (50 CFR 216.31(a)). The addition of this language is not intended to substantively change the criteria for granting scientific permits, and is merely codifying the regulations.

The Committee expects the Secretary of the Interior to use a similar standard in implementing this section.

Research permits may not be issued for unnecessary duplication of research. This is to ensure that permits are not issued for numerous, duplicative requests for takings of marine mammals if the research is not expected to enhance the body of scientific knowledge. Unnecessary duplication is not synonymous with replication. The repetition of an experiment or procedure to confirm or test the results of the research is recognized as fundamental and crucial to science. Section 205 of the MMPA already directs the Marine Mammal Commission to take every feasible step to avoid duplication of research. This subsection clarifies the application of this standard to scientific research permits.

In the case of scientific research that would involve the killing of marine mammals, permits may only be issued if it is determined that the research cannot reasonably be done using alternative, nonlethal techniques. The Committee encourages the development of such techniques. Further, in the case of lethal research involving depleted marine mammals, the research must either fulfill a critically important research need or directly benefit the affected species or population stock.

New paragraph (4) of section 104(c) provides that the Secretary may issue a permit for enhancing the survival or recovery of a species or stock only if the Secretary determines that the taking or importation is likely to contribute significantly to the survival of the species, and is consistent with any applicable conservation or recovery plan. If no recovery or conservation plan exists, the Secretary is required to evaluate the proposal on the basis of the factors that would be addressed in such plan.

The amendment allows for captive maintenance of depleted species if the Secretary first makes a number of determinations. Also, the Secretary may allow the public display of such marine mammals only he or she determines that the display is incidental to the authorized maintenance and will not interfere with the attainment of the survival or recovery objectives.

SECTION 6.—AUTHORIZATION OF APPROPRIATIONS

Section 6 authorizes appropriations to the Department of Commerce, the Department of the Interior, and the Marine Mammal Commission to carry out their responsibilities under this Act, other than the Secretary of Commerce's responsibility to provide observer coverage for commerical fishing vessels, through fiscal year 1993, for which appropriations are authorized under new section 114(e) of the MMPA.

SECTION 7.—STUDY ON MORTALITY OF ATLANTIC DOLPHIN

Section 7 requires the Secretary of Commerce to conduct a study regarding the epidemic and high mortality of east coast Atlantic bottlenosed dophins which occurred in 1987 and 1988. A plan for conducting the study must be submitted to the House and the Senate before January 1, 1989, and the final report on the study must be submitted before January 1, 1990. The Committee notes that the Secretary has already begun preparations for such a study

and does not intend this section to disrupt or unduly modify existing study plans.

SECTION 8.—AMENDMENTS TO FISHERMEN'S PROTECTIVE ACT OF 1967

This section amends section 8(a)(4) of the Fishermen's Protective Act by deleting the word "fish" and inserting the word "any" in its place. In addition, the definition of "fish products" is deleted in section 8(h) because it is no longer needed in light of the deletion of "fish" from section 8(a)(4).

The result of these amendments is to provide the President with a wider range of options from which to choose sanctions that may be warranted against a foreign nation that diminishes the effectiveness of an international fishery conservation program. The President is authorized to embargo any product, rather than only fish products, from a certified nation. The decision by the President as to whether to embargo any product, however, would remain entirely discretionary, and any embargo would still have to be consistent with the General Agreement on Tariffs and Trade.

The Committee expects that the expanded range of discretionary sanctions provided by this section will encourage foreign governments to consult and consider their decisions more carefully before proceeding with actions that diminish the effectiveness of international fishery conservation programs. The goal is not to sanction nations, but to encourage cooperation and compliance with such programs so that sanctions are not necessary.

The need for more effective international efforts to secure the protection of whales, porpoise, and other fishery resources is increasingly evident. The objective of this section is to contribute to the success of those efforts.

SECTION 9.—PRIBILOF ISLAND TRUST FUNDS

Consistent with the desire of Congress to see that the Pribilof Islanders are able to establish an enduring and diversified economy, this section authorizes additional funds for the St. Paul and St. George Trusts for the following purposes: (1) $1,700,000 for St. Paul Trust for FY 1989 to be used to provide essential services for the people of that island, and an additional $1,500,000 which may be appropriated for the purpose of providing collateral to guarantee the purchase of fuel oil, should present efforts to guarantee the purchase through private sources continue to be unsuccessful; (2) $1,800,000 for the St. Paul Trust for FY 1990 to allow continued funding of essential services through June 1990, at which time it is anticipated that revenue from the newly completed harbor will begin to be available; and (3) $3,700,000 to the St. George Trust for FY 1990 to provide essential services and allow completion of the St. George Harbor project. Of this amount, the Committee understands that $1,900,000 is needed for essential services, while the remaining $1,800,000 would be used for the purchase of construction equipment.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as

reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman).

MARINE-MAMMAL PROTECTION ACT OF 1972

Section 101 of that Act

MORATORIUM AND EXCEPTIONS

SEC. 101. (a) There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this Act, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

[(1) Permits may be issued by the Secretary for taking and importation for purposes of scientific research and for public display if—]

(1) Consistent with the provisions of section 104, permits may be issued by the Secretary for taking and importation for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock if—

(A) through (B) * * *

* * * * * * *

(2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 104 subject to regulations prescribed by the Secretary in accordance with section 103. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of pure seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incident kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary—

(A) shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commerical fishing technology in use for such fish or fish products exported from such nation to the United States; [and]

(B) in the case of yellowfin tuna harvested with purse seines in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States, shall re-

quire that the government of the exporting nation provide documentary evidence that—

(i) the government of the harvesting nation has adopted a regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to that of the United States; and

(ii) the average rate of the incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of marine mammals by United States vessels in the course of such harvesting[.], *except that the Secretary shall not find that the regulatory program, or the average rate of incidental taking by vessels, of a harvesting nation is comparable to that of the United States for purposes of clause (i) or (ii) of this paragraph unless—*

(I) the regulatory program of the harvesting nation includes, by no later than the beginning of the 1990 fishing season, such prohibitions against encircling pure schools of species of marine mammals, conducting sundown sets, and other activities as are made applicable to United States vessels;

(II) the average rate of the incidental taking by vessels of the harvesting nation is no more than 2.0 times that of United States vessels during the same period by the end of the 1989 fishing season and no more than 1.25 times that of United States vessels during the same period by the end of the 1990 fishing season and thereafter;

(III) the total number of eastern spinner dolphin (Stenella longirostris) incidentally taken by vessels of the harvesting nation during the 1989 and subsequent fishing seasons does not exceed 15 percent of the total number of all marine mammals incidentally taken by such vessels in such year and the total number of coastal spotted dolphin (Stenella attenuata) incidentally taken by such vessels in such seasons does not exceed 2 percent of the total number of all marine mammals incidentally taken by such vessels in such year;

(IV) the rate of incidental taking of marine mammals by the vessels of the harvesting nation during the 1989 and subsequent fishing seasons is monitored by the porpoise mortality observer program of the Inter-American Tropical Tuna Commission or an equivalent international program in which the United States participates and is based upon observer coverage that is equal to that achieved for United States vessels during the same period, except that the Secretary may approve an alternative observer program if the Secretary determines, no less than sixty days after publication in the Federal Register of the Secretary's proposal

and reasons therefor, that such an alternative observer program will provide sufficiently reliable documentary evidence of the average rate of incidental taking by a harvesting nation; and

(V) the harvesting nation complies with all reasonable requests by the Secretary for cooperation in carrying out the scientific research program required by section 104(h)(3) of this title;

(C) shall require the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such ban on importation to the United States; and

(D) shall, six months after importation of yellowfin tuna or tuna products has been banned under this section, certify such fact to the President, which certification shall be deemed to be a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)) for as long as such ban is in effect.

(3)(A) * * *

(B) Except for scientific research purposes *or enhancing the survival or recovery of a species or stock* as provided for in paragraph (1) of this subsection, during the moratorium no permit may be issued for the taking of any marine mammal which has been designated by the Secretary as depleted, and no importation may be made of any such mammal.

(4) through (5) * * *

(b) through (c) * * *

Section 102 of that Act

PROHIBITIONS

SEC. 102. (a) Except as provided in sections 101, 103, 104, 109, 111, [and 113] *113, and 114* of this title, it is unlawful—

(1) through (5) * * *

(b) Except pursuant to a permit for scientific [research] *research, or for enhancing the survival or recovery of a species or stock,* issued under section 104(c) of this title it is unlawful to import into the United States any marine mammal if such mammal was—

(1) pregnant at the time of taking;

(2) nursing at the time of taking, or less than eight months old, whichever occurs later;

(3) taken from a species or population stock which the Secretary has, by regulation published in the Federal Register, designated as a depleted species or stock; or

(4) taken in a manner deemed inhumane by the Secretary.

Notwithstanding the provisions of paragraphs (1) and (2), the Secretary may issue a permit for the importation of a marine mammal, if

the Secretary determines that such importation is necessary for the protection or welfare of the animal.

(c) through (f) * * *

Section 104 of that Act

PERMITS

SEC. 104. (a) * * *

(b) * * *

(c)*(1)* Any permit issued by the Secretary which authorizes the taking or importation of a marine mammal for purposes of [display or scientific research] *scientific research, public display, or enhancing the survival or recovery of a species or stock* shall specify, in addition to the conditions required by subsection (b) of this section, the methods of capture, supervision, care, and transportation which must be observed pursuant to and after such taking or importation. Any person authorized to take or import a marine mammal for purposes of [display or scientific research] *scientific research, public display, or enhancing the survival or recovery of a species or stock* shall furnish to the Secretary a report on all activities carried out by him pursuant to that authority.

(2) A permit may be issued for public display purposes only to an applicant which offers a program for education or conservation purposes that, based on professionally recognized standards of the public display community, is acceptable to the Secretary and which submits with the permit application information indicating that the applicant's facilities are open to the public on a regularly scheduled basis and that access to the facilities is not limited or restricted other than by the charging of an admission fee.

(3) A permit may be issued for scientific research purposes only to an applicant which submits with its permit application information indicating that the taking is required to further a bona fide scientific purpose and does not involve unnecessary duplication of research. No permit issued for purposes of scientific research shall authorize the killing of a marine mammal unless the applicant demonstrates that a nonlethal method for carrying out the research is not feasible. The Secretary shall not issue a permit for research which involves the lethal taking of a marine mammal from a species or stock designated as depleted, unless the Secretary determines that the results of such research will directly benefit that species or stock, or that such research fulfills a critically important research need.

(4)(A) A permit may be issued for enhancing the survival or recovery of a species or stock only with respect to a species or stock for which the Secretary, after consultation with the Marine Mammal Commission and after notice and opportunity for public comment, has first determined that—

(i) taking or importation is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock; and

(ii) taking or importation is consistent (I) with any conservation plan adopted by the Secretary under section 115(b) of this title or any recovery plan developed under section 4(f) of the Endangered Species Act of 1973 for the species or stock, or (II) if

there is no conservation or recovery plan in place, with the Secretary's evaluation of the actions required to enhance the survival or recovery of the species or stock in light of the factors that would be addressed in a conservation plan or a recovery plan.

(B) A permit issued in accordance with this paragraph may allow the captive maintenance of a marine mammal from a depleted species or stock only if the Secretary—

(i) determines that captive maintenance is likely to contribute to the survival or recovery of the species or stock by maintaining a viable gene pool, increasing productivity, providing biological information, or establishing animal reserves;

(ii) determines that the expected benefit to the affected species or stock outweighs the expected benefit of alternatives which do not require removal of animals from the wild; and

(iii) requires that the marine mammal or its progeny be returned to the natural habitat of the species or stock as soon as feasible, consistent with the objectives of any applicable conservation plan or recovery plan, or of any evaluation by the Secretary under subparagraph (A).

The Secretary may allow the public display of such a marine mammal only if the Secretary determines that such display is incidental to the authorized maintenance and will not interfere with the attainment of the survival or recovery objectives.

(d) through (g) * * *

(h)(1) * * *

(2)(A) Subject to paragraph (B), the general permit issued under paragraph (1) on December 1, 1980 to the American Tunaboat Association is extended to authorize and govern the taking of marine mammals incidental to commercial purse seine fishing for yellowfin tuna during each year after December 31, 1984.

(B) The extension granted under subparagraph (A) is subject to the following conditions:

(i) through (iii) * * *

(iv) The Secretary shall, by January 1, 1989, prescribe regulations to ensure that the backdown procedure during sets of the purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than thirty minutes after sundown. The Secretary may waive or otherwise modify such regulations for—

(I) a designated certificate holder on an observed trip if the Secretary determines, based on observer reports, that such restriction is not necessary because the certificate holder has consistently utilized fishing techniques and equipment so as to result in an incidental marine mammal mortality rate during sundown sets that is no higher than the average such rate for the fleet during daylight sets; or

(II) all certificate holders on observed trips if the Secretary determines that such restriction is not necessary because all certificate holders have developed and are utilizing fishing techniques and equipment that assure that the incidental marine mammal mortality rate during sundown sets will be no higher than such rate during daylight sets.

(v) The Secretary may authorize, after public notice and opportunity for comment, designated certificate holders to conduct experimental fishing operations on observed trips, under such terms and conditions as the Secretary may prescribe, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce the incidental mortality of marine mammals in the course of commercial yellowfin tuna fishing operations, and the Secretary may waive such terms and conditions of the general permit and this section, other than the quotas on incidental taking of marine mammals and the prohibition against encircling pure schools of certain species of marine mammals, as the Secretary determines to be necessary and appropriate for the conduct of such experimental fishing.

(vi) The Secretary, after public notice and opportunity for comment and consultation with the skippers' panel of experts established pursuant to the general permit, shall develop and implement by not later than the beginning of the 1990 fishing season a system of performance standards to maintain the diligence and proficiency of certificate holders in the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The system shall include such arrangements as are necessary for the identification of certificate holders whose incidental marine mammal mortality rate is consistently and substantially higher than the average rate of the fleet, and for the supplemental training and observation of such certificate holders, and provisions for suspension or revocation of certificates of inclusion of those certificate holders whose unacceptably high rate of incidental taking reflects a lack of diligence or proficiency in the use of the best marine mammal safety techniques and equipment.

(vii) It shall be unlawful to use any explosive devices other than class C explosive pest control devices in the course of commercial yellowfin tuna fishing subject to the general permit. The Secretary shall prescribe regulations, effective April 1, 1990, to prohibit or restrict the use of class C explosive pest control devices in the course of commercial yellowfin tuna fishing unless the Secretary determines, based on a study which the Secretary shall undertake, that the use of such devices does not result in physical impairment or increased mortality of marine mammals.

(viii) During the 1989 and subsequent fishing seasons, each certificated vessel shall carry on every fishing trip subject to this subsection an official observer certified by the Secretary or by the Inter-Americn Tropical Tuna Commission for the purpose of conducting research and observing fishing operations unless, for reasons beyond the control of the Secretary, an observer is not available for such purpose. The Secretary may waive this requirement after the 1991 fishing season and establish a less extensive observer program if the Secretary, after notice and opportunity for comment, determines that such an alternative program will provide sufficiently reliable information.

(ix) The Secretary shall annually convene meetings with representatives of conservation and environmental organizations, the commercial tuna fishing industry, and other interested per-

sons for the purpose of discussing the results of efforts to reduce the incidental mortality and serious injury of marine mammals undere this subsection as well as throughout the international fleet as a whole and developing plans for such efforts during the next year. On or before April 1, 1992, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a comprehensive report on the results of such efforts. The report shall discuss the results of the scientific research programs, performance standards, observer program, prohibition on sundown sets, development of alternative fishing techniques, and other efforts required by this section, and shall include recommendations for such action as the Secretary considers necessary and desirable to reduce further the total mortality and serious injury of marine mammals in the course of commercial yellowfin tuna fishing throughout the international fleet.

(C) * * *

(3) * * *

Section 108 of that Act

INTERNATIONAL PROGRAM

SEC. 108. The Secretary, through the Secretary of State, shall—

(1) * * *

[(2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which are found by the Secretary to be unduly harmful to any species of marine mammal, for the purpose of entering into bilateral and multilateral treaties with such countries to protect marine mammals. The Secretary of State shall prepare a draft agenda relating to this matter for discussion at appropriate international meetings and forums;]

(2) initiate—

(A) negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which are found by the Secretary to be unduly harmful to any species or population stock of marine mammal, for the purpose of entering into bilateral and multilateral treaties with such countries to protect marine mammals, with the Secretary of State to prepare a draft agenda relating to this matter for discussion at appropriate international meetings and forums; and

(B) discussions with foreign governments whose vessels harvest yellowfin tuna with purse seines in the eastern tropical Pacific Ocean, for the purpose of concluding, through the Inter-American Tropical Tuna Commission or such other bilateral or multilateral institutions as may be appropriate, international arrangements for the conservation of marine mammals taken incidentally in the course of harvesting such tuna, which should include provisions for (i) cooperative research into alternative methods of locating

and catching yellowfin tuna which do not involve the taking of marine mammals, (ii) cooperative research on the status of affected marine mammal population stocks, (iii) reliable monitoring of the number, rate, and species of marine mammals taken by vessels of harvesting nations, (iv) limitations on incidental take levels based upon the best scientific information available, and (v) the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable to reduce the incidental kill and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate;

(3) through (6) * * *

(b) * * *

(c) The Secretary shall include a description of the annual results of discussions initiated and conducted pursuant to subsection (a)(2)(B), as well as any proposals for further action to achieve the purposes of that subsection, in the report required under section 103(f) of this title.

Section 109 of that Act

FEDERAL COOPERATION WITH STATES

SEC. 109. (a) * * *

(b)(1) Subject to paragraph (2) and subsection (f), the Secretary shall transfer management authority for a species of marine mammal to a State if the Secretary finds, after notice and opportunity for public comment, that the State has developed and will implement a program for the conservation and management of the species that—

(A) through (D) * * *

(E) does not permit the taking of the species for scientific [research and public display purposes] *research, public display, or enhancing the survival or recovery of a species or stock,* except for taking for such purposes that is undertaken by, or on behalf of, the State;

(F) through (G) * * *

(2) * * *

(3) After the determination required under paragraph (1)(C)(i) regarding a species is final and implemented under State law and after a cooperative allocation agreement described in subsection (d)(1), if required, is implemented for such species—

(A) * * *

(B) the Secretary shall regulate, without regard to this section other than the allocations specified under such an agreement, the taking of the species—

(i) * * *

(ii) for scientific [research or public display purposes] *research, public display, or enhancing the survival or recovery of a species or stock* (other than by, or on behalf of, the State), except that any taking authorized under a permit issued pursuant to section 101(a)(1) after the date of the enactment of the 1981 amendment to this subsection allowing the removal of live animals from habitat within the

State shall not be effective if the State agency disapproves, on or before the date of issuance of the permit, such taking as being inconsistent with the State program; and

(C) * * *

(c) through (g) * * *

[(h) Nothing in this title shall prevent a Federal, State, or local government official or employee or a person designated under section 112(c) from taking, in the course of his duties as an official, employee, or designee, a marine mammal in a humane manner (including euthanasia) if such taking is for—

[(1) the protection or welfare of the mammal,

[(2) the protection of the public health and welfare, or

[(3) the nonlethal removal of nuisance animals,

and, in any case in which the return of the mammal to its natural habitat is feasible, includes steps designed to achieve that result.]

(h)(1) Nothing in this title shall prevent a Federal, State, or local government official or employee or a person designated under section 112(c) from taking, in the course of his or her duties as an official, employee, or designee, a marine mammal in a humane manner (including euthanasia) if such taking is for—

(A) the protection or welfare of the mammal,

(B) the protection of the public health and welfare, or

(C) the nonlethal removal of nuisance animals.

(2) Nothing in this title shall prevent the Secretary or a person designated under section 112(c) from importing a marine mammal into the United States if such importation is necessary to render medical treatment that is not otherwise available.

(3) In any case in which it is feasible to return to its natural habitat a marine mammal taken or imported under circumstances described in this subsection, steps to achieve that result shall be taken.

(i) through (l) * * *

Section 110 of that Act

MARINE MAMMAL RESEARCH GRANTS

SEC. 110. (a)*(1)* The Secretary is authorized to make grants, or to provide financial assistance in such other form as he deems appropriate, to any Federal or State agency, public or private institution, or other person for the purpose of assisting such agency, institution, or person to undertake research in subjects which are relevant to the protection and conservation of marine mammals. In carrying out this subsection, the Secretary shall undertake a program of, and shall provide financial assistance for, research into new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals. The Secretary shall include a description of the annual results of research carried out under this section in the report required under section 103(f).

(2) For purposes of identifying appropriate research into promising new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals, the Secretary shall contract for an independent review of information pertaining to such potential alternative methods to be conducted by the National Academy of Sciences with individuals having scientific, technical, or other expertise that may be relevant to the identification of promising alter-

native fishing techniques. The Secretary shall request that the independent review be submitted to the Secretary on or before September 8, 1989, and the Secretary shall submit the report of the independent review, together with a proposed plan for research, development, and implementation of alternative fishing techniques, to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on or before December 5, 1989.

(b) through (c) * * *

New Section 114 of that Act

INTERIM EXEMPTION FOR COMMERCIAL FISHERIES

SEC. 114. (a)(1) During the period beginning on the date of enactment of this section and ending October 1, 1993, except as provided in paragraph (2), the provisions of this section, rather than sections 101, 103, and 104, shall govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States and vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)). In any event it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.

(2) The provisions of this section other than subsection (e)(6)(A) shall not govern the incidental taking of marine mammals in the course of commercial yellowfin tuna fishing subject to section 104(h)(2) of this title.

(b)(1) The Secretary shall, after consultation with the Marine Mammal Commission—

(A) publish in the Federal Register, for public comment, not later than sixty days after the date of enactment of this section a proposed list of those fisheries, along with a statement of the marine mammals and the approximate number of vessels or persons involved in each such fishery, that have—

(i) frequent incidental taking of marine mammals;

(ii) occasional incidental taking of marine mammals; or

(iii) a remote likelihood of or no known incidental taking of marine mammals;

(B) publish in the Federal Register not later than one hundred and twenty days after the date of enactment of this section a final list of the fisheries and other information required by paragraph (A), together with a summary of the provisions of this section and information sufficient to advise vessel owners on how to obtain an exemption and otherwise comply with the requirements of this section; and

(C) at least once each year thereafter, and at such other times as the Secretary considers appropriate, reexamine, based on information gathered from the program established under subsections (c), (d), (e), and (f), and other relevant sources and after notice and opportunity for public comment, the classification of fisheries and other determinations required under subpara-

graph (A) and publish in the Federal Register any necessary changes.

(2)(A) An exemption shall be granted by the Secretary in accordance with this section for a vessel engaged in a fishery identified under paragraph (1)(A) (i) or (ii), upon receipt by the Secretary of a completed registration form providing the name of the vessel owner, the name and description of the vessel, the fisheries in which it will be engaged, and such other information as the Secretary considers necessary. A decal or other physical evidence that the exemption is current and valid shall be issued by the Secretary at the time an exemption is granted, and so long as the exemption remains current and valid, shall be reissued annually thereafter.

(B) No exemption may be granted under this section to the owner of a vessel unless such vessel—

(i) is a vessel of the United States; or

(ii) has a valid fishing permit issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)).

(C) Notwithstanding any other provision of this title, exemptions granted under this section shall authorize the incidental taking of marine mammals, other than California sea otters, from any species or stock, including a population stock designated as depleted, but shall not authorize the intentional lethal taking of any Steller sea lion, any cetacean, or any marine mammals from a population stock designated as depleted.

(3)(A) Beginning two hundred and forty days after the date of enactment of this section, each owner of a vessel engaged in any fishery identified under paragraph (1)(A) (i) or (ii) shall, in order to engage lawfully in that fishery—

(i) have registered with the Secretary in order to obtain for each such vessel owned an exemption for the purpose of incidentally taking marine mammals in accordance with this section;

(ii) ensure that a decal or such other physical evidence of a current and valid exemption as the Secretary may require is displayed on or is in the possession of the master of each such vessel; and

(iii) report as required by subsection (c).

(B) Any owner of a vessel receiving an exemption under this section for any fishery identified under paragraph (1)(A)(i) shall, as a condition of that exemption, take on board a natural resource observer if requested to do so by the Secretary.

(C) An owner of a vessel engaged in a fishery identified under paragraph (1)(A) (i) or (ii) who—

(i) fails to obtain from the Secretary an exemption under this section;

(ii) fails to maintain a current and valid exemption; or

(iii) fails to ensure that a decal or other physical evidence of such exemption issued by the Secretary if displayed on or is in possession of the master of the vessel,

and the master of any such vessel engaged in such fishery, shall be deemed to have violated this title, and shall be subject to the penalties of this title except in the case of unknowing violations before January 1, 1990.

(D) If the owner of a vessel has obtained and maintains a current and valid exemption from the Secretary under this section and meets the requirements set forth in this section, the owner of such vessel, and the master and crew members of the vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals while such vessel is engaged in a fishery to which the exemption applies.

(E) Each owner of a vessel engaged in any fishery not identified in paragraph (1)(A) (i) or (ii), and the master and crew members of such a vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals if such owner reports to the Secretary, in such form and manner as the Secretary may require, instances of lethal incidental taking in the course of that fishery.

(4) The Secretary shall suspend or revoke an exemption granted under this section and shall not issue a decal or other physical evidence of the exemption for any vessel until the owner of such vessel complies with the reporting requirements under subsection (c) and such requirements to take on board a natural resource observer under paragraph (3)(B) as are applicable to such vessel.

(5)(A) The Secretary shall develop, in consultation with the appropriate States, Regional Fishery Management Councils, and other interested parties, the means by which the granting and administration of exemptions under this section shall be integrated and coordinated, to the maximum extent practicable, with existing fishery licenses, registrations, and related programs.

(B) The Secretary shall utilize newspapers of general circulation, fishery trade associations, electronic media, and other means of advising commercial fishermen of the provisions of this section and the means by which they can comply with its requirements.

(C) The Secretary is authorized to charge a fee for the granting of an exemption under this subsection. The level of fees charged under this subparagraph shall not exceed the administrative costs incurred in granting an exemption. Fees collected under this subparagraph shall be available to the Under Secretary of Commerce for Oceans and Atmosphere for expenses incurred in the granting and administration of exemptions under this section.

(c) The owner of each vessel holding an exemption granted under subsection (b) of this section shall regularly compile information which shall be used in a report to be submitted to the Secretary at the close of the fishing season or annually, as the Secretary may prescribe. Such report shall be submitted in such form as the Secretary may require and shall include the following:

(1) the type of fishery engaged in by the owner's vessel;

(2) the date and approximate time of any incidental taking of a marine mammal, together with the area in which the incidental taking occured, the fishing gear used at the time of the incidental taking, and the species of fish involved; and

(3) for each incidental taking, the number and species of marine mammals involved, whether the marine mammals were deterred from gear or catch, incidentally injured, incidentally killed, or lethally removed to protect gear, catch, or human life.

If there was no incidental taking of marine mammals during the reporting period, a report stating that fact shall be filed with the Secretary.

(d)(1) The Secretary shall establish a program to enhance the quality of and verify information received from reports submitted by owners of vessels who have been granted an exemption under subsection (b) of this section. The program shall include, but not be limited to—

(A) education efforts regarding the information that must be submitted;

(B) interviews with fishermen; and

(C) other such information gathering and verification activities that will enable the Secretary to determine reliably the nature, type, and extent of the incidental taking of marine mammals that occurs in a fishery.

Except to the extent authorized by the provisions of subsection (e), the program shall not include placement of observers aboard exempted vessels.

(2) Information obtained under this subsection shall be subject to the confidentiality provisions of subsection (j).

(e)(1) For each fishery identified under subsection (b)(1)(A)(i) of this section, the Secretary shall, after consultation with the appropriate Regional Fishery Management Councils, other Federal and State agencies, and other interested parties, and subject to paragraph (6), place observers on board exempted vessels so as to monitor not less than 20 percent nor more than 35 percent of the fishing operations by vessels in the fishery to obtain statistically reliable information on the species and number of marine mammals incidentally taken in the fishery. If the Secretary determines that fewer than 20 percent of the fishing operations by vessels in the fishery will be monitored during the course of the fishing season, the Secretary shall implement the alternative observation program described in subsection (f) to the extent necessary to supplement the observer program described in this subsection.

(2) When determining the distribution of observers among fisheries and between vessels in a particular fishery, the Secretary shall be guided by the following standards:

(A) the requirement to obtain the best scientific information available;

(B) the requirement that assignment of observers is fair and equitable among fisheries and among vessels in a fishery;

(C) consistent with paragraph (1), the requirement that no individual person or vessel, or group of persons or vessels, be subject to excessive or overly burdensome observer coverage; and

(D) where practicable, the need to minimize costs and avoid duplication.

(3) If the Secretary finds that, for reasons beyond his or her control, the Secretary cannot assign observers to all the fisheries identified under subsection (b)(1)(A)(i) of this section at the level of observer coverage set forth in paragraph (1), the Secretary shall allocate available observers among such fisheries, consistent with paragraph (2), according to the following priority;

(A) those fisheries that incidentally take marine mammals from any population stock designated as depleted;

(B) those fisheries that incidentally take marine mammals from population stocks that the Secretary believes are declining;

(C) those fisheries other than those described in subparagraphs (A) and (B) in which the greatest incidental take of marine mammals occur; and

(D) any other fishery identified under subsection (b)(1)(A)(i).

The Secretary may, with the consent of the vessel owner, station an observer on board a vessel engaged in a fishery not identified under subsection (b)(1)(A)(i).

(4) Information gathered by observers shall be subject to the provisions of subsection (j). Consistent with the requirements of paragraph (1), the Secretary shall, if requested by the appropriate Regional Fishery Management Council, or in the case of a State fishery, the State, require observers to collect additional information, including but not limited to the quantities, species, and physical condition of target and non-target fishery resources and, if requested by the Secretary of the Interior, seabirds.

(5) Notwithstanding the provisions of paragraph (4), the Secretary may decline to require observers to collect information described in such paragraph, if the Secretary finds in writing, following public notice and opportunity for comment, that such information will not contribute to the protection of marine mammals or the understanding of the marine ecosystem, including fishery resource and seabirds.

(6) The Secretary shall not be required to place an observer on a vessel in a fishery if the Secretary finds that—

(A) in a situation where harvesting vessels are delivering fish to a processing vessel and the catch is not taken on board the harvesting vessel, statistically reliable information can be obtained from an observer on board the processing vessel to which the fish are delivered;

(B) the facilities of a vessel for the quatering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of vessel would be jeopardized; or

(C) for reasons beyond the control of the Secretary, an observer is not available.

(7)(A) An observer on a vessel (or the observer's personal representative) under the requirements of this section or section 104 that is ill, disabled, injured or killed from service as an observer on that vessel may not bring a civil action under any law of the United States for that illness, disability, injury, or death against the vessel or vessel owner, except that a civil action may be brought againt the vessel owner for the owner's willful misconduct.

(B) This paragraph does not apply if the observer is engaged by the owner, master, or individual in charge of a vessel to perform any duties in service to the vessel.

(8) There are authorized to be appropriated to the Department of Commerce for the purposes of carrying out this subsection not to exceed $2,700,000 for fiscal year 1989 and not to exceed $8,000,000 for each of the fiscal years 1990, 1991, 1992, and 1993.

(f)(1) The Secretary shall establish an alternative observation program to provide statistically reliable information on the species and number of marine mammals incidentally taken in those fisheries

identified pursuant to subsection (b)(1)(A)(i) of this section for which the required level of observer coverage has not been met or for any other fisheries about which such reliable information is not otherwise available. The alternative program shall include, but not be limited to, direct observation of fishing activities from vessels, airplanes, or points on shore.

(2) Individuals engaged in the alternative observation program shall collect scientific information on the fisheries subject to observation, consistent with the requirements of paragraph (1) and subsection (e) (4) and (5). All information collected shall be subject to the provisions of subsection (j).

(g)(1) The Secretary shall review information regarding the incidental taking of marine mammals and evaluate the effects of such incidental taking on the affected population stocks of marine mammals.

(2) If the Secretary finds, based on the information received from the programs established under subsections (c), (d), (e), and (f), that the incidental taking of marine mammals in a fishery is having an immediate and significant adverse impact on a marine mammal population stock or, in the case of Steller sea lions and North Pacific fur seals, that more than 1,350 and 50, respectively, will be incidentally killed during a calendar year, the Secretary shall consult with appropriate Regional Fishery Management Councils and State fishery managers and prescribe emergency regulations to prevent to the maximum extent practicable any further taking. Any emergency regulations prescribed under this paragraph—

(A) shall, to the maximum extent practicable, avoid interfering with existing State or regional fishery management plans;

(B) shall be published in the Federal Register together with the reasons therefor;

(C) shall remain in effect for not more than one hundred and eighty days or until the end of the fishing season, whichever is earlier; and

(D) may be terminated by the Secretary at an earlier date by publication in the Federal Register of a notice of termination if the Secretary determines the reasons for the emergency regulations no longer exist.

In prescribing emergency regulations under this paragraph, the Secretary shall take into account the economics of the fishery concerned and the availability of existing technology to prevent or minimize incidental taking of marine mammals.

(3) If the Secretary finds, based on information received from the programs established under subsections (c), (d), (e), and (f), that incidental taking of marine mammals in a fishery is not having an immediate and significant adverse impact on a marine mammal population stock but that it will likely have a significant adverse impact over a period of time longer than one year, the Secretary shall request the appropriate Regional Fishery Management Council or State to initiate, recommend, or take such action within its authority as it considers necessary to mitigate the adverse impacts, including adjustments to requirements on fishing times or areas or the imposition of restrictions on the use of vessels or gear.

(4) The Secretary shall impose appropriate conditions and restrictions on an exemption granted under subsection (b) if—

(A) a Regional Fishery Management Council or State does not act in a reasonable period of time on a request made by the Secretary under paragraph (3); or

(B) if the Secretary determines after notice and opportunity for public comment that the purposes of this section would be better served by such action.

(h) The Secretary shall design and implement an information management system capable of processing and analyzing reports received from the programs established under subsections (c), (d), (e), and (f), and other relevant sources, including Federal and State enforcement authorities, marine mammal stranding networks, and the marine mammal researchers. The information shall be made accessible to the public on a continuing basis, but in any case no later than six months after it is received, subject to the provisions of subsection (j).

(i) When carrying out the Secretary's responsibilities under subsections (b), (d), (e), (f), and (h) of this section, the Secretary shall, to the maximum extent practicable, utilize the services and programs of State agencies, Federal agencies (including programs established by Regional Fishery Management Councils), marine fisheries commissions, universities, and private entities, on a reimbursable basis or otherwise. The Secretary is authorized to enter into contracts and agreements to carry out his or her responsibilities and shall establish appropriate guidelines to ensure that other programs used or contracted for will meet the same standards as a program established by the Secretary. A person contracting with the Secretary to provide observer services under subsection (e) of this section must provide evidence of financial responsibility in an amount and form prescribed by the Secretary to compensate employees (or their survivors) adequately for any illness, disability, injury, or death from service on a vessel.

(j)(1) Any information collected under subsection (c), (d), (e), (f), or (h) of this section shall be confidential and shall not be disclosed except—

(A) to Federal employees whose duties require access to such information;

(B) to State employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person;

(C) when required by court order; or

(D) in the case of scientific information involving fisheries, to employees of Regional Fishery Management Councils who are responsible for fishery management plan development and monitoring.

(2) The Secretary shall prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary shall release or make public any such information in aggregate, summary, or other form which does not directly or indirectly disclose the identity or business of any person.

(k) The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as necessary and appropriate to carry out the purposes of this section.

(l)(1) The Chairman of the Marine Mammal Commission shall, after consultation with interested parties and not later than February 1, 1990, transmit to the Secretary and make available to the public recommended guidelines to govern the incidental taking of marine mammals in the course of commercial fishing operations, other than those subject to section 104(h)(2), after October 1, 1983. Such guidelines shall be developed by the Commission and its Committee of Scientific Advisers on Marine Mammals and shall—

(A) be designed to provide a scientific rationale and basis for determining how many marine mammals may be incidentally taken under a regime to be adopted to govern such taking after October 1, 1993;

(B) be based on sound principles of wildlife management, and be consistent with and in furtherance of the purposes and policies set forth in this Act; and

(C) to the maximum extent practicable, include as factors to be considered and utilized in determining permissible levels of such taking—

(i) the status and trends of the affected marine mammal population stocks;

(ii) the abundance and annual net recruitment of such stocks;

(iii) the level of confidence in the knowledge of the affected stocks; and

(iv) the extent to which incidental taking will likely cause or contribute to their decline or prevent their recovery to optimum sustainable population levels.

(2) The Secretary shall advise the Chairman of the Commission in writing if the Secretary determines that any additional information or explanation of the Chairman's recommendations is needed, and the Chairman shall respond in writing to any such request by the Secretary.

(3) On or before February 1, 1991, the Secretary, after consultation with the Marine mammal Commission, Regional Fishery Management Councils, and other interested governmental and nongovernmental organizations, shall publish in the Federal Register, for public comment, the suggested regime that the Secretary considers should, if authorized by enactment of any additional legislation, govern incidental taking of marine mammals, other than those subject to section 104(h)(2), after October 1, 1993. The suggested regime shall include—

(A) the scientific guidelines to be used in determining permissible levels of incidental taking;

(B) a description of the arrangements for consultation and cooperation with other Federal agencies, the appropriate Regional Fishery Management Councils and States, the commercial fishing industry, and conservation organizations; and

(C) a summary of such regulations and legislation as would be necessary to implement the suggested regime.

(4) On or before January 1, 1992, the Secretary, after consultation with the Marine Mammal Commission, and consideration of public comment, shall transmit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives recommenda-

tions pertaining to the incidental taking of marine mammals, other than those subject to section 104(h)(2), after October 1, 1993. The recommendations shall include—

(A) the suggested regime developed under paragraph (3) of this subsection as modified after comment and consultations;

(B) a proposed schedule for implementing the suggested regime; and

(C) such recommendations for additional legislation as the Secretary considers necessary or desirable to implement the suggested regime.

(m) The Secretary shall consult with the Secretary of the Interior prior to taking actions or making determinations under this section that affect or relate to species or population stocks of marine mammals for which the Secretary of the Interior is responsible under this title.

(n) For the purposes of this section, the owner of fixed or other commercial fishing gear that is deployed with or without the use of a vessel shall be deemed to be an owner of a vessel engaged in the fishery in which that gear is deployed.

(o) As used in this section—

(1) the term "fishery" has the same meaning as it does in section 3(8) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802(8)).

(2) the term "Secretary" means the Secretary of Commerce.

(3) the term "vessel engaged in a fishery" means a fishing vessel as defined in section 2101(11a) of title 46, United States Code, or a fish processing vessel as defined in section 2101(11b) of that title, which is engaged in fishery.

(4) the term "vessel of the United States" has the same meaning as it does in section 3(27) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802(27)).

New Section 115 of that Act

STATUS REVIEW; CONSERVATION PLANS

SEC. 115. (a)(1) In any action by the Secretary to determine if a species or stock should be designated as depleted, or should no longer be designated as depleted, regardless of whether such action is taken on the initiative of the Secretary or in response to a petition for a status review, the Secretary shall only make such a determination by issuance of a rule, after notice and opportunity for public comment and after a call for information in accordance with paragraph (2).

(2) The Secretary shall make any determination described in paragraph (1) solely on the basis of the best scientific information available. Prior to the issuance of a proposed rule concerning any such determination, the Secretary shall publish in the Federal Register a call to assist the Secretary in obtaining scientific information from individuals and organizations concerned with the conservation of marine mammals, from persons in any industry which might be affected by the determination, and from academic institutions. In addition, the Secretary shall utilize, to the extent the Secretary determines to be feasible, informal working groups of interested parties and other methods to gather the necessary information.

(3)(A) If the Secretary receives a petition for a status review as described in paragraph (1), the Secretary shall publish a notice in the Federal Register that such a petition has been received and is available for public review.

(B) Within sixty days after receipt of the petition, the Secretary shall publish a finding in the Federal Register as to whether the petition presents substantial information indicating that the petitioned action may be warranted.

(C) If the Secretary makes a positive finding under subparagraph (B), the Secretary shall include in the Federal Register notice, a finding that—

(i) a review of the status of the species or stock will be commenced promptly; or

(ii) a prompt review of the petition is precluded by other pending status determination petitions and that expeditious progress is being made to process pending status determination petitions under this title.

In no case after making a finding under this subparagraph shall the Secretary delay commencing a review of the status of a species or stock for more than one hundred and twenty days after receipt of the peition.

(D) No later than two hundred and ten days after the receipt of the petition, the Secretary shall publish in the Federal Register a proposed rule as to the status of the species or stock, along with the reasons underlying the proposed status determination. Persons shall have at least sixty days to submit comments on such a proposed rule.

(E) Not later than ninety days after the close of the comment period on a proposed rule issued under subparagraph (D), the Secretary shall issue a final rule on the status of the species or stock involved, along with the reasons for the status determination. If the Secretary finds with respect to such a proposed rule that there is substantial disagreement regarding the sufficiency or accuracy of the available information relevant to a status determination, the Secretary may delay the issuance of a final rule for a period of not more than six months for purposes of soliciting additional information.

(F) Notwithstanding subparagraphs (D) and (E) of this paragraph and section 553 of title 5, United States Code, the Secretary may issue a final rule as to the status of a species or stock any time sixty or more days after a positive finding under subparagraph (B) if the Secretary determines there is substantial information available to warrant such final status determination and further delay would pose a significant risk to the well-being of any species or stock. Along with the final rule, the Secretary shall publish in the Federal Register detailed reasons for the expedited determination.

(b)(1) The Secretary shall prepare conservation plans—

(A) By December 31, 1989, for North Pacific fur seals;

(B) by December 31, 1990, for Steller sea lions; and

(C) as soon as possible, for any species or stock designated as depleted under this title, except that a conservation plan need not be prepared if the Secretary determines that it will not promote the conservation of the species or stock.

(2) Each plan shall have the purpose of conserving and restoring the species or stock to its optimum sustainable population. The Secretary shall model such plans on recovery plans required under section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f)).

(3) The Secretary shall act expeditiously to implement each conservation plan prepared under paragraph (1). Each year, the Secretary shall specify in the annual report prepared under section 103(f) of this title what measures have been taken to prepare and implement such plans.

Section 116 of that Act

(Presently Section 114)

AUTHORIZATION OF APPROPRIATIONS

SEC. [114] *116.* (a) * * *
(b) * * *

Section 202 of that Act

DUTIES OF COMMISSION

SEC. 202. (a) The Commission shall—
(1) * * *
(2) conduct a continuing review of the condition of the stocks of marine mammals, of methods for their protection and conservation, of humane means of taking marine mammals, of research programs conducted or proposed to be conducted under the authority of this Act, and of all applications for permits for scientific research, *public display, or enhancing the survival or recovery of a species or stock*;
(3) through (7) * * *
(b) through (d) * * *

FISHERMEN'S PROTECTIVE ACT OF 1967

Section 8 of that Act

SEC. 8. (a)(1) * * *
(2) through (3) * * *
(4) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of [fish] *any* products (if the certification is made under paragraph (1)) or wildlife products (if the certification is made under paragraph (2)) from the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.
(b) through (g) * * *
(h) As used in this section—
(1) through (3) * * *
[(4) The term "fish products" means fish and marine mammals and all products thereof taken by fishing vessels of an offending country whether or not packed, processed, or otherwise prepared for export in such country or within the jurisdiction thereof.]

(5) through (7) * * *

FUR SEAL ACT OF 1966

Section 206 of that Act

SEC. 206. (a) * * *

(b) through (d) * * *

(e)(1) There are authorized to be appropriated to the Secretary $20,000,000 for the purpose of funding the Trust in accordance with the requirements of subsection (a)(2) of this section. *In addition, there are authorized to be appropriated to the Secretary $3,200,000 for fiscal year 1989 and $1,800,000 for fiscal year 1990 to be used for the purpose of funding the Saint Paul Island Trust, as established pursuant to subsection (a)(1) of this section, and $3,700,000 for fiscal year 1990 to be used for the purpose of funding the Saint George Trust, as established pursuant to subsection (a)(1).*

ACT OF OCTOBER 9, 1981

Section 7 of that Act

AUTHORIZATION OF APPROPRIATIONS

SEC. 7. (a) DEPARTMENT OF COMMERCE.—There are authorized to be appropriated to the Department of Commerce, for purposes of carrying out such functions and responsibilities as it may have been given under title I (other than section 104(h)(3)) of the Marine Mammual Protection Act of 1972, $7,223,000 for fiscal year 1982, $8,000,000 for fiscal year 1983, and $8,800,000 for each of fiscal years 1984, 1985, 1986, 1987, and 1988. *There are authorized to be appropriated to the Department of Commerce, for purposes of carrying out such functions and responsibilities as it may have been given under such title (other than section 114(e)(8), $12,250,000 for fiscal year 1989, $12,740,000 for fiscal year 1990, $13,250,000 for fiscal year 1991, $13,780,000 for fiscal year 1992, and $14,331,000 for fiscal year 1993.*

(b) DEPARTMENT OF THE INTERIOR.—There are authorized to be appropriated to the Department of the Interior, for purposes of carrying out such functions and responsibilities as it may have been given under such title I, $1,600,000 for fiscal year 1982, $1,760,000 for fiscal year 1983. $2,000,000 for fiscal year 1984, $2,500,000 for fiscal year 1985, [and] $3,000,000 for each of fiscal year 1986, 1987, [and 1988] *1988, and 1989, $3,120,000 for fiscal year 1990, $3,240,000 for fiscal year 1991, $3,370,000 for fiscal year 1992, and $3,500,000 for fiscal year 1993.*

(c) MARINE MAMMAL COMMISSION.—There are authorized to be appropriated to the Marine Mammal Commission, for purposes of carrying out title II of such Act of 1972, $672,000 for fiscal year 1982, $1,000,000 for fiscal year 1983, [and] $1,100,000 for each of fiscal years 1984, 1985, 1986, 1987, [and 1988] *1988, and 1989, $1,140,000 for fiscal year 1990, $1,190,000 for fiscal year 1991, $1,230,000 for fiscal year 1992, and $1,280,000 for fiscal year 1993.*

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